Supreme Court, U.S.
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No. ____

In The

Supreme Court of the United States

October Term, 1998

ATLAS COPCO AB, ATLAS COPCO ROBBINS INC.
ATLAS COPCO COMPRESSORS INC., AND
ATLAS COPCO COMPTEC INC.,

Petitioners,

v.

ALPINE VIEW COMPANY LTD. AND BJORN HANSEN,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a federal district court is absolutely barred in all circumstances from dismissing a removed case for lack of personal jurisdiction without first deciding its subject-matter jurisdiction?

PARTIES

Petitioners are Atlas Copco AB, Atlas Copco Robbins Inc., Atlas Copco Compressors Inc., and Atlas Copco Comptec Inc. Petitioners were the Defendants in the underlying action originally filed in Texas state court and removed to the United States District Court for the Southern District of Texas, Houston Division, and were the Appellees in the Fifth Circuit Court of Appeals. Petitioners will be referred to herein collectively as "Defendants" unless some distinction is necessary.

Respondents are Alpine View Company Ltd. and Bjorn Hansen. Respondents were Plaintiffs in the underlying litigation and were the Appellants in the Fifth Circuit. Respondents are referred to herein as "Plaintiffs".

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, Petitioners Atlas Copco AB, Atlas Copco Robbins Inc., Atlas Copco Compressors Inc., and Atlas Copco Comptec Inc. state:

Atlas Copco AB has no parent company. It has the following nonwholly owned subsidiaries:

Atlas Copco (India) Ltd., Atlas Copco (Malaysia) Sdn Bhd, Atlas Copco Maroc SA, and Atlas Copco North America Inc.

Atlas Copco Robbins Inc. until June of 1998 was a wholly owned subsidiary of Atlas Copco North America Inc. Currently Atlas Copco Robbins Inc. is known as Robbins PBM Inc. and is a wholly owned subsidiary of The Robbins Company formerly known as Boretec Inc. The Robbins Company has no parent company.

Atlas Copco Compressors Inc. is a wholly owned subsidiary of Atlas Copco North America Inc.

Atlas Copco Comptec Inc. is a wholly owned subsidiary of Atlas Copco North America Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Atlas Copco AB ("ACAB"), Atlas Copco Robbins Inc. ("Robbins"), Atlas Copco Compressors Inc. ("Compressors"), and Atlas Copco Comptec Inc. ("Comptec") respectfully pray that a writ of *certiorari* issue to review the decision of the United States Court of Appeals for the Fifth Circuit dated August 20, 1998. On December 7, 1998, this Court granted the petition for writ of *certiorari* filed by Rhurgas in Cause No. 98-470, styled *Ruhrgas AG v. Marathon Oil Co., et al.*, ___ S.Ct. ___ 1998 WL 651066 (U.S.). The procedural circumstances in this case are similar, if not identical, to those in *Marathon* and were the basis for the Fifth Circuit's decision in this case. Issuance of writ of *certiorari* in this case is therefore appropriate, warranted and consistent with this Court's action in *Marathon*.

In this case, the Fifth Circuit, on its Summary Calendar, issued a *per curiam* opinion that (a) vacated the Memoranda and Recommendations of the Magistrate Judge dismissing ACAB for lack of personal jurisdiction, dismissing Robbins for lack of personal jurisdiction, denying Plaintiffs' motion to remand as moot, and dismissing Comptec and Compressors based on *forum non conveniens*, (b) vacated the Orders of the District Court adopting the Memoranda and Recommendations, and (c) remanded the case to the District Court for determination of subject-matter jurisdiction. The Fifth Circuit based its *per curiam* opinion on *Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211 (5th Cir. 1998), *cert. granted*, ___ S.Ct. ___, 1998 WL 651066 (U.S.), stating:

> During the pendency of this appeal, our Court sitting en banc decided *Marathon Oil Co. v. A.G.*

> *Ruhrgas*, No. 96-20361, 1998 WL 329842 (5th Cir. June 22, 1998) (en banc). The procedural circumstances involved in this appeal are very similar to those involved in *Marathon Oil* and our decision herein is controlled by that en banc decision. Appendix A pp. 1-2.

In *Marathon Oil v. Ruhrgas*, by a vote of 9 to 7, a majority of the Fifth Circuit, sitting *en banc* held that in a removed case, a federal district court never has discretion to dismiss for lack of personal jurisdiction before deciding whether it has subject-matter jurisdiction. 145 F.3d at 217-225. In this case, the Fifth Circuit reached the identical conclusion, ordering "that this case be remanded to the district court for a determination as to whether the federal district court has subject matter jurisdiction of the cause of action as removed from the state court." Appendix A p. 3.

OPINIONS AND ORDERS DELIVERED BELOW

The *per curiam* opinion of the court below (August 20, 1998), and the *per curiam* opinion denying the petition for rehearing (September 17, 1998) are not reported and are reprinted as Appendix A hereto.

The Memorandum and Recommendation of the Magistrate Judge recommending that (a) ACAB's motion to dismiss for lack of personal jurisdiction be granted, (b) Robbins' motion to dismiss for lack of personal jurisdiction be granted and (c) Plaintiffs' motion to remand be denied as moot (July 31, 1996) is not reported and is reprinted as Appendix B hereto.

The Order of the District Court adopting the Magistrate Judge's Memorandum and Recommendation and granting the motions to dismiss for lack of personal jurisdiction, denying Robbins' motion to dismiss[1] based on subject-matter jurisdiction as moot and denying Plaintiffs' motion to remand as moot (October 1, 1996) is not reported and is reprinted in Appendix C hereto.

The Memorandum and Recommendation of the Magistrate Judge granting Comptec and Compressor's motions to dismiss based on *forum non conveniens* (August 1, 1996) is not reported and is reprinted as Appendix D hereto.

The Order of the District Court denying Plaintiffs' motion to remand as moot and ordering Plaintiffs to file any supplemental responses to the motions to dismiss based on *forum non conveniens* (September 4, 1996) is not reported and is reprinted as Appendix E hereto.

The Order of the District Court adopting the Magistrate Judge's Memorandum and Recommendation and granting the motions to dismiss based on *forum non conveniens* (October 1, 1998) is not reported and is reprinted in Appendix F hereto.

The Order of the District Court denying Plaintiffs' motion to amend orders of dismissal or, in the alternative, motion for new trial and Plaintiffs' supplement to Plaintiffs' motion to amend orders of dismissal or, in the

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[1] The Court mistakenly referred to Robbins rather than ACAB. Only ACAB filed a motion to dismiss for lack of subject-matter jurisdiction.

alternative, motion for new trial (September 29, 1997) is not reported and is reprinted in Appendix G hereto.

JURISDICTION OF THIS COURT

This petition for a writ of *certiorari* seeks review of the August 20, 1998 *per curiam* decision of the United States Court of Appeals for the Fifth Circuit. On September 17, 1998 the petition for rehearing was denied. Jurisdiction of this Court to review the decision of that court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. art. III:

> Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. amend. V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

U.S. Const. amend. XIV:

> Section 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

This case arises out of an international commercial agreement involving the future distribution of bits, rods, adapters and other rock drilling tools to be manufactured in China. The agreement, entitled "Intentional Agreement between Uniroc AB and Alpine View Company Ltd.", was negotiated and executed in Norway and Sweden ("Intentional Agreement").

Uniroc AB, a wholly owned subsidiary of ACAB, is not a party in this case. The Intentional Agreement contains a Norwegian choice of law clause and a broad arbitration provision providing for arbitration in Oslo, Norway. None of the Defendants in this case is a signatory to the Intentional Agreement.

On August 4, 1995 Plaintiffs filed suit in the district court of Harris County, Texas, against ACAB, Robbins, Compressors and Comptec. Compressors and Comptec are wholly owned subsidiaries of Atlas Copco North America Inc. At the time suit was filed, Robbins was also

a wholly owned subsidiary of Atlas Copco North America Inc. Atlas Copco North America Inc. is a nonwholly owned subsidiary of ACAB.

Despite the fact that none of the Defendants is a party to the Intentional Agreement, in the lawsuit, Plaintiffs alleged that each Defendant breached the Intentional Agreement. The Plaintiffs further alleged that the Intentional Agreement imposed on each of the Defendants a duty of good faith and fair dealing which had been breached. Without delineating which Defendant was responsible for which act, Plaintiffs further contended that ACAB, together with the other Defendants, made fraudulent promises and representations, as well as negligent misrepresentations in connection with the Intentional Agreement. Again without delineating among Defendants and without stating with specificity when, where and how, Plaintiffs additionally contended that certain acts of tortious interference were done by ACAB and the other Defendants to interfere with the Intentional Agreement. Plaintiffs also alleged that ACAB was the alter ego of Comptec, Compressors and/or Robbins.

Comptec, Compressors and Robbins removed the case to federal court contending that ACAB was not subject to the personal jurisdiction of Texas, and therefore, had been fraudulently joined to defeat subject-matter jurisdiction based on diversity of citizenship. Robbins filed a motion to dismiss for lack of personal jurisdiction. ACAB filed motions to dismiss for lack of personal jurisdiction, for failure to serve ACAB pursuant to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 20 U.S.T. § 361 T.I.A.S. 6638 and for lack of subject-matter

jurisdiction based on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38. Compressors and Comptec filed motions to dismiss based on *forum non conveniens*.

Plaintiffs filed a motion to remand contending the District Court lacked subject-matter jurisdiction, that diversity jurisdiction did not exist because alien parties were present on both sides of the lawsuit and that any question regarding personal jurisdiction over ACAB was not germane to the determination of whether the action was properly removed.

On July 31, 1996, the Magistrate Judge entered her Memorandum and Recommendation. In addressing Plaintiffs' argument that the court should not consider ACAB's personal jurisdiction motion, the Magistrate Judge stated:

> Plaintiffs argue that the removal of this case was improper, but that "any question of the personal jurisdiction over [ACAB] is not germane to the determination of whether the action was properly removed." . . . However, the Fifth Circuit has held that "district courts have the power to rule on motions challenging personal jurisdiction before reaching motions to remand." *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1494 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 690 (1994) (*citing Walker v. Savell*, 355 F.2d 536, 539 (5th Cir. 1964)). The court explained that "judicial economy favors this result because if the district court remands the proceeding, then the state court will probably have to decide the same

> motion to dismiss for lack of personal jurisdiction that the district court avoided." *Villar*, 990 F.2d at 1494. The *Villar* court recognized that "the district court must necessarily address the issue of personal jurisdiction regardless of which motion it addresses first." *Id.* In the interest of judicial economy, the court will examine ACAB's motions to dismiss under Fed. R. Civ. P. 12(b) before ruling on Plaintiffs' motion to remand. Appendix B pp. 4-5.

The Magistrate Judge recommended that the motions to dismiss for lack of personal jurisdiction filed by ACAB and Robbins be granted and that Plaintiffs' motion to remand be denied as moot. Appendix B p. 29.

Thereafter, on August 1, 1996, the Magistrate Judge recommended that Comptec and Compressor's motions to dismiss based on *forum non conveniens* be granted. Appendix D p. 17.

On September 4, 1996, the District Court entered an order denying Plaintiffs' motion to remand as moot, and ordering Plaintiffs to file any supplement to their preliminary response to the motions to dismiss based on *forum non conveniens* within five days. This order in effect confirmed a finding of subject-matter jurisdiction by the District Court or the District Court would not have considered the *forum non conveniens* motions. Appendix E.

On October 1, 1996, the District Court entered an order adopting the Magistrate Judge's Memorandum and Recommendation, thereby granting ACAB and Robbins' motions to dismiss for lack of personal jurisdiction, denying ACAB's motion to dismiss based on subject-matter jurisdiction as moot and denying Plaintiffs' motion to

remand as moot. Appendix C. Also on October 1, 1996, the District Court entered an order adopting the Magistrate Judge's Memorandum and Recommendation and granted Comptec and Compressor's motions to dismiss based on *forum non conveniens*, provided Comptec and Compressors stipulated and agreed to submit to the jurisdiction of the courts of Norway or Sweden. If either failed or refused to submit to jurisdiction of the courts of Norway or Sweden, the Plaintiffs could move for reinstatement of the action. Appendix E.

Plaintiffs thereafter filed a motion and memorandum of law to amend orders of dismissal or, in the alternative, motion for new trial and subsequently supplemented that motion. On September 29, 1997, the Court denied these motions. Appendix G.

Plaintiffs appealed. On appeal, on the summary docket, the Fifth Circuit in a *per curiam* opinion and without considering the issue of personal jurisdiction, vacated the Memoranda and Recommendations of the Magistrate Judge and the Orders of the District Court adopting those Memoranda and Recommendations stating:

> During the pendency of this appeal, our Court sitting en banc decided *Marathon Oil Co. v. A.G. Ruhrgas*, No. 96-20361, 1998 WL 329842 (5th Cir. June 22, 1998) (en banc). The procedural circumstances involved in this appeal are very similar to those involved in *Marathon Oil* and our decision herein is controlled by that en banc decision. Appendix A pp. 1-2.

The case was "remanded to the district court for a determination as to whether the federal district has subject-matter jurisdiction of the cause of action as removed from the state court." Appendix A p. 3.

Defendants filed a petition for rehearing with the Fifth Circuit, contending that the September 4, 1996 order of the court denying Plaintiffs' motion to remand as moot and ordering additional briefing on the issue of *forum non conveniens* was in effect a finding of subject-matter jurisdiction. The petition for rehearing was denied on September 17, 1998. Appendix A p. 4.

REASONS FOR GRANTING THE WRIT

The courts of appeals have held uniformly that a federal court always has jurisdiction to determine its own jurisdiction. *See, e.g., Muthig v. Brant Point Nantucket, Inc.*, 838 F.2d 600, 603 (lst Cir. 1988); *Szabo Food Service, Inc. v. Canteen Corp.*, 823 F.2d 1073, 1078 (7th Cir. 1987). No rule of civil procedure denies a federal district court the discretion to dismiss a case for want of jurisdiction based upon a lack of personal jurisdiction as opposed to subject-matter jurisdiction. A range of discretion to choose the basis for dismissal for want of jurisdiction has long been recognized. Consistent with that premise, the courts of appeals have held that district courts have the discretion to dismiss a removed case, in appropriate circumstances, for want of personal jurisdiction, before reaching the issue of subject-matter jurisdiction. *See, e.g., Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152, 155 (2d Cir. 1996); *Asociacion Nacional de Pescadores v. Dow Quimica*, 988 F.2d

559, 556-57 (5th Cir. 1993), *cert. denied*, 510 U.S. 1041, 114 S.Ct. 685 (1994); *Wilson v. Belin*, 20 F.3d 644, 651 n.8 (5th Cir.), *cert. denied*, 513 U.S. 930, 115 S.Ct. 322 (1994); *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1494 (5th Cir. 1993), *cert. denied*, 510 U.S. 1044, 114 S.Ct. 690 (1994); *Walker v. Savell*, 335 F.2d 36, 538-539 (5th Cir. 1964); *see also Allen v. Ferguson*, 791 F.2d 611, 615 (7th Cir. 1986).[2] As Judge Higginbotham noted in his dissent in *Marathon*: "The practice has been so commonplace that only two other circuits have even had the occasion to address the issue, despite its regular appearance on the dockets of federal trial courts across the country." 145 F.3d at 227 (Higginbotham, J., dissenting), (citing *Cantor Fitzgerald*, 88 F.3d at 155 and *Allen*, 791 F.2d at 615). The majority of the *en banc* court in *Marathon*, nevertheless, ruled that the Second Circuit's decision in *Cantor Fitzgerald* and the prior Fifth Circuit decisions upholding this "commonplace" practice were wrongly decided. Based on the *Marathon* decision, the Fifth Circuit has remanded the instant case solely because the District Court in the interest of judicial economy decided the issue of personal jurisdiction before reaching the issue of subject-matter jurisdiction, despite the fact that the issues of personal and subject-matter jurisdiction were inextricably intertwined and "the district court must necessarily address the issue of personal jurisdiction regardless of which motion it addresses first". Appendix B p. 5; *Villar*, 990 F.2d at 1494.

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[2] The *Allen* court conducted an analysis of the complexity of the alleged personal jurisdiction defects, thereby implicitly assuming that in certain circumstances a district court could dismiss for want of personal jurisdiction.

The mandatory rule now adopted by the Fifth Circuit – that district courts in every removed case must decide the subject-matter element of their jurisdiction before deciding personal jurisdiction – is not consistent with this Court's prior decisions dealing with the jurisdiction of federal courts and is in direct conflict with the Second Circuit's decision in *Cantor Fitzgerald*. The mandatory rule also creates a rigid sequencing of jurisdictional decisions in removed cases that unnecessarily hampers the management of the crowded federal district court dockets.

If *certiorari* is not granted, the conflicting decisions of the Fifth and Second Circuits on this important procedural question will create uncertainty concerning the proper manner of proceeding in removed cases in district courts across the nation. Those courts following the Fifth Circuit rule will be forced to decide difficult subject-matter jurisdiction issues presented in removed cases, even when the case may be disposed of easily on personal jurisdiction grounds. There is no constitutional, statutory, or jurisprudential requirement for a mandatory rule, and it constitutes "unauthorized appellate rulemaking." *Marathon*, 145 F.3d at 225, 233 (Higginbotham, J., dissenting).

I. The Fifth Circuit's Decision Conflicts with Prior Decisions of this Court

The Fifth Circuit's decision to remand this case to the District Court is predicated on the concept that a jurisdictional hierarchy exists, with subject-matter jurisdiction being elevated above personal jurisdiction. This artificial ordering requires that subject-matter jurisdiction must be

determined first in every removed case. This mandatory concept cannot be reconciled with prior decisions of this Court.

In *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 701 (1982), this Court stated that "[t]he validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties." Similarly, in *Employers Reinsurance Corp. v. Bryant*, 299 U.S. 374, 382 (1937), this Court held that personal jurisdiction "is an essential element of the jurisdiction of a district . . . court as a federal court, and that in the absence of this element the court is powerless to proceed to an adjudication."

In this case, Plaintiffs contend that there is a lack of complete diversity and in the absence of complete diversity, subject-matter jurisdiction does not exist. This same jurisdictional defect was alleged by the plaintiffs in *Marathon*. As recognized by Judge Higginbotham in *Marathon*

> . . . [O]ne of the attacks upon jurisdiction pointed to here as a defect in subject-matter jurisdiction – a lack of complete diversity – is not itself a requirement of Article III, but rather suffers from a want of a jurisdictional grant by Congress. In the literal sense then, personal jurisdiction rests more immediately upon a constitutional command than does a want of complete diversity.

Marathon, 145 F.3d at 229 (Higginbotham, J., dissenting).

The majority opinion in *Marathon*, with its elevation of subject-matter jurisdiction above personal jurisdiction in importance and therefore in sequencing, as noted by Judge Higginbotham in his dissent, "rests on a flawed

vision of the relationship between Article III and the power of the inferior courts." 145 F.3d at 229 (Higginbotham, J., dissenting). Both personal jurisdiction and subject-matter jurisdiction "are rooted in core constitutional precepts" – subject-matter jurisdiction in Article III; personal jurisdiction in the Due Process Clause – and are critical to the power of the Court. *Id.* Both components of the federal courts' jurisdiction over a particular case – subject-matter and personal – are derived from the Constitution, and both are essential elements of a court's power to proceed to an adjudication.

In *Marathon*, the majority decision concluded that Article III limitations on a federal court's power are superior to due process limitations on a federal court's power. Nothing in the Constitution or this Court's prior decisions supports this conclusion and its application to this case. To uphold this conclusion, the *Marathon* majority relied on *Steel Co. v. Citizens for a Better Env't*, ___ U.S. ___, 118 S.Ct. 1003 (1998), a case inappositive to the facts of this case. In *Steel Co.*, this Court did not differentiate between subject-matter jurisdiction and personal jurisdiction, but stressed that "the requirement that jurisdiction be established as a threshold matter . . . is 'inflexible and without exception,' " and that " 'without jurisdiction the court cannot proceed at all in any cause.' " *Id.* at 1012 (quoting *Mansfield, C. & L.N.R. Co. v. Swan*, 111 U.S. 379, 382, 4 S.Ct. 310, 511 (1884) and *Ex parte McCardle*, 7 Wall. 506, 514, 19 L.Ed. 264 (1868)). This Court repudiated the prior practice of some courts of appeals of " 'assuming' [subject-matter jurisdiction] for the purpose of deciding the merits." *Id.*

There is a "plain lack of relevance" of these principles to the issue presented in this case. *Marathon*, 145 F.3d at 228 (Higginbotham, J., dissenting). Issues that go to the merits of a claim are distinct from issues of jurisdiction. "The foundation of jurisdiction is physical power." *McDonald v. Mabee*, 243 U.S. 90 (1917). As held by this Court in *Employers Reinsurance*, a court may lack that power either because it does not have jurisdiction over the subject matter or because it does not have jurisdiction over the person of the defendant. 299 U.S. at 381-82. This Court's decision in *Steel Co.* stands for the sound proposition that a court must have "jurisdiction" before reaching the merits of a case. "Jurisdiction," however, encompasses both subject-matter jurisdiction and personal jurisdiction. *Steel Co.* simply does not reach the question of which of two jurisdictional issues must be resolved first as the majority opinion in *Marathon* suggests and as the Fifth Circuit ruled in this case. Indeed, until the decision in *Marathon*, the courts of appeals have held that the sequencing of jurisdictional questions was a matter of trial practice and convenience, reviewed on appeal on an abuse of discretion standard. This case is among the first, if not the first, to be remanded based on the *Marathon* mandatory rule.

Additionally, the action of the Fifth Circuit in remanding this case cannot be reconciled with this Court's decision in *Caterpillar, Inc. v. Lewis*, 519 U.S. 61 (1996). In *Caterpillar*, the district court, lacking complete diversity upon removal, erroneously overruled the plaintiff's objection to subject-matter jurisdiction. Later, the dismissal of a nondiverse defendant following settlement cured the lack of complete diversity. The rule created in

Marathon "suggests that every decision entered by the *Caterpillar* district court following the improper removal, from the dismissal of the nondiverse party to the entry of final judgment, was void." *Marathon*, 145 F.3d at 229 (Higginbotham, J., dissenting). This Court, however, reached a contrary result, and rejected the jurisdictional challenge in *Caterpillar*. As Judge Higginbotham noted in his dissent in *Marathon*, "[i]f the Supreme Court tolerates a capture of jurisdiction through the dismissal of a settling party by a court that lacked subject-matter jurisdiction, surely it permits a district court to dismiss a case for want of personal jurisdiction, before considering a challenge to subject-matter jurisdiction." 145 F.3d at 229 (Higginbotham, J., dissenting).

The *Marathon* mandatory rule adopted by the Fifth Circuit and utilized in this case, which prohibits federal district courts from ever dismissing a removed case for lack of personal jurisdiction before reaching a question of subject-matter jurisdiction, is not consistent with prior jurisprudence from this Court.

II. The Fifth Circuit's Decision to Remand this Case Conflicts with the Second Circuit's Decision in *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d 152 (2d Cir. 1996)

In *Cantor Fitzgerald, L.P. v. Peaslee*, 88 F.3d at 155, the Second Circuit held that the district court in that removed case "properly exercised its discretion in first deciding the motion to dismiss for lack of personal jurisdiction over the defendants before considering the question of federal subject-matter jurisdiction." In this case, relying

on *Marathon*, the Fifth Circuit has held that no such discretion ever can exist in a removed case. Appendix A pp. 1-2. There is a direct conflict between *Cantor Fitzgerald* and the Fifth Circuit's decision in this case.

To deal with the conflict between *Cantor Fitzgerald* and *Marathon* and by extension the case at bar, the majority opinion in *Marathon* concluded that *Cantor Fitzgerald* itself is inconsistent with an earlier Second Circuit decision, *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674 (2d Cir. 1990). *Marathon*, 145 F.3d at 222. *Cantor Fitzgerald*, however, expressly distinguished *Rhulen*, by recognizing that the personal jurisdictional challenge in *Rhulen* was not easier to resolve than the subject-matter jurisdiction challenge. When the personal jurisdiction defect is easier to resolve, *Cantor Fitzgerald* holds that the personal jurisdictional defect may be considered first. *See* 145 F.3d at 227 n.2 (Higginbotham, J., dissenting); *see also Cantor Fitzgerald*, 88 F.3d at 155. *Cantor Fitzgerald* represents the law of the Second Circuit. The mandatory rule applied in this case directly conflicts with the Second Circuit rule.

The majority decision in *Marathon* also concluded that *Cantor Fitzgerald* was grounded on the doctrine of "hypothetical jurisdiction", basing its conclusion on the fact that *Browning-Ferris Indus. v. Muszynski*, 899 F.2d 151 (2d Cir. 1990), one of the cases cited by the court in *Cantor Fitzgerald*, advocated the "hypothetical-jurisdiction" doctrine. *Marathon*, 145 F.3d 223. The holding in *Cantor Fitzgerald*, however, is not premised on "hypothetical jurisdiction" – the assumption of jurisdiction for the purpose of deciding the merits – a doctrine which was discredited by this Court in *Steel Co.* When presented with

two jurisdictional questions – subject-matter and personal – the court is deciding jurisdiction – not hypothecating the existence of jurisdiction, for federal courts have jurisdiction to determine their own jurisdiction. *Marathon*, 145 F.3d at 229 (Higginbotham, J., dissenting); *Szabo*, 823 F.2d at 1078. The decision to remand this case is predicated upon the *Marathon* decision. Both this decision and the *Marathon* decision directly conflict with the Second Circuit's decision in *Cantor Fitzgerald*.

III. Federalism Concerns Support the Discretionary Rule Adopted by the Second Circuit in *Cantor Fitzgerald*, Utilized by the District Court in this Case and Proposed by the Dissent in *Marathon*

Federalism concerns do not require that district courts always decide subject-matter jurisdiction before personal jurisdiction in a removed case. The prior circuit decisions addressing the question properly have considered federalism concerns on a case-by-case basis. In *Asociacion Nacional*, 988 F.2d at 566-67, the court noted that the question of personal jurisdiction "is basically a constitutional one, not a matter of construing Texas law." Thus, the "federal intrusion into state courts' authority" was "minimized" and personal jurisdiction could properly be addressed first. *Id.* In contrast, the court in *Allen* recognized that the personal jurisdiction issue raised in *Allen* involved state law issues that were not easier to resolve than the subject-matter issues. 791 F.2d at 616. The *Allen* court held that because subject-matter was the more easily resolved issue, it was an abuse of discretion to resolve the personal jurisdiction issue first. *Id.*

In this case, the personal jurisdiction issue is a simple question of federal law. As recognized by the District Court, "the district court must necessarily address the issue of personal jurisdiction regardless of which motion it addresses first." Appendix B p. 5 relying on *Villar*, 990 F.2d at 1494. Similarly, in *Marathon* "[t]he question of subject-matter jurisdiction turns in part upon the presence of personal jurisdiction . . . ". *Marathon*, 145 F.3d at 232 (Higginbotham, J., dissenting). Under these circumstances, as found by the District Court in this case, it is appropriate for a district court to exercise its discretion to decide personal jurisdiction first.

The discretionary rule adopted by the Second Circuit in *Cantor Fitzgerald*, employed by the District Court in this case, and proposed by Judge Higginbotham in his dissent in *Marathon*, is consistent with constitutional requirements, gives due consideration to federalism concerns, preserves the flexibility needed by the federal district courts in the management of their dockets, and promotes judicial efficiency. The district court should have the discretion to first resolve a challenge to personal jurisdiction in appropriate circumstances. When the attack on personal jurisdiction presents a question of federal law that is far more easily resolved than a challenge to subject-matter jurisdiction, when the defendant's removal is not frivolous and made in apparent good faith, when the challenge to personal jurisdiction does not raise significant issues of state law or the attack on subject-matter jurisdiction does, and when the question of subject-matter jurisdiction turns in part upon the personal jurisdiction, the district court should be permitted to first

resolve the personal jurisdiction challenge. *Marathon*, 145 F.3d at 232 (Higginbotham, J., dissenting).

No constitutional, statutory or jurisprudential requirement for the inflexible, mandatory rule adopted by the Fifth Circuit in *Marathon* and applied by the Fifth Circuit in this case exists. The discretionary rule is preferable and supported by federalism concerns.

IV. This Case Presents an Important Federal Question

The federal district courts in this country have enjoyed the discretion to choose to avoid difficult questions of subject-matter jurisdiction when the case may be resolved easily through dismissal for lack of personal jurisdiction. As Judge Higginbotham noted in his dissent in *Marathon*, "[t]he practice has been . . . commonplace . . . ," 145 F.3d at 227 (Higginbotham, J., dissenting), and is consistent with principles of judicial restraint, which teach that federal courts should not reach out to resolve complex and controversial questions when a decision may be based on a narrower ground. *Id.* at 231; *see Allen*, 791 F.2d at 615. The rule adopted by the Fifth Circuit in *Marathon* and implemented in this case, requiring that the district courts address difficult issues of subject-matter jurisdiction, even when federal law clearly mandates that the case be dismissed for lack of personal jurisdiction, will have a real, practical, and negative effect on the federal district courts' overly crowded dockets. "To insist upon a 'rigid order of operations' in today's world of federal court caseloads that have grown enormously over a generation means unnecessary delay and consequent

added cost." *Steel Co.*, 118 S.Ct. at 1021 (Breyer, J., concurring). While this Court held in *Steel Co.* that the Constitution mandates that the district courts decide jurisdictional issues before reaching merits issues, there is no constitutional, statutory, or jurisprudential requirement for a rigid order of decision when a district court is presented with two independent jurisdictional questions.

As Judge Higginbotham prophetically noted in *Marathon*:

> [A] level of discretion is enormously preferable to the majority's alternative, a mechanical and rigid ordering of decision making. We cannot see around corners, nor can we predict the infinite variety of cases that may one day come before our district courts. Rules that lack flexibility are often vices in and of themselves when dealing with trial courts. . . . The very nature of the work of a federal trial judge here makes discretion a value in itself.

145 F.3d at 232 (Higginbotham, J., dissenting).

As evidenced by this case, the application of the *Marathon* mandatory rule has a practical and negative impact on each federal district court in the management of removed cases. The question whether federal district courts are required to follow a rigid order of decision on jurisdictional issues in removed cases is an important issue of federal constitutional and procedural law that is deserving of review by this Court. Defendants respectfully request that this Court grant *certiorari* to resolve the conflict between the Second and Fifth Circuits and to provide guidance to the district courts on this important federal question.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 97-20879
Summary Calendar

ALPINE VIEW COMPANY LIMITED; BJORN HANSEN,

Plaintiffs-Appellants,

VERSUS

ATLAS COPCO A.B.; ATLAS COPCO ROBBINS; ATLAS COPCO COMPRESSORS INCORPORATED; AND ATLAS COPCO COMPTEC INCORPORATED,

Defendants-Appellees.

Appeal from the United States District Court
For the Southern District of Texas

(H-95-CV-4477)

(Filed Aug. 20, 1998)

Before EMILIO M. GARZA, DeMOSS, and BENAVIDES, Circuit Judges. PER CURIAM:*

During the pendency of this appeal, our Court sitting en banc decided *Marathon Oil Co. v. A.G. Ruhrgas*, No. 96-20361, 1998 WL 329842 (5th Cir. June 22, 1998) (en banc). The procedural circumstances involved in this

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*Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

appeal are very similar to those involved in *Marathon Oil* and our decision herein is controlled by that en banc decision.

Accordingly, we vacate the following orders entered in the court below:

a. Memorandum and Recommendation entered under date of July 31, 1996 by the magistrate judge which recommended (i) that defendant Atlas Copco AB's motion to dismiss for lack of personal jurisdiction (docket entry 22) be granted; (ii) that defendant Atlas Copco Robbins' motion to dismiss for lack of personal jurisdiction (docket entry 26) be granted; and (iii) that plaintiffs' motion to remand this case (docket entry 16) be denied as moot.

b. The Order of the district court entered on October 1, 1996 adopting the magistrate judge's Memorandum and Recommendation entered under date of July 31, 1996 as described in the foregoing subparagraph;

c. The Memorandum and Recommendation entered under date of August 1, 1996 by the magistrate judge which recommended that the motions of defendants Atlas Copco Comptec, Inc. and Atlas Copco Compressors, Inc. to dismiss for forum non conveniens (docket entries 4 and 9) be granted; and

d. The Order of the district court entered under date of October 1, 1996 adopting the magistrate judge's Memorandum and Recommendation entered under date of August 1, 1996 as described in the foregoing subparagraph.

IT IS FURTHER ORDERED that this case be remanded to the district court for a determination as to whether the federal district court has subject matter jurisdiction of the cause of action as removed from the state court.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 97-20879

ALPINE VIEW COMPANY LIMITED; BJORN HANSEN

Plaintiffs-Appellants

v.

ATLAS COPCO AB; ATLAS COPCO ROBBINS; ATLAS COPCO COMPRESSORS INCORPORATED; ATLAS COPCO COMPTEC INCORPORATED;

Defendants-Appellees

Appeal from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING

(Filed Sep. 17, 1998)

Before EMILIO M. GARZA, DeMOSS, and BENAVIDES, Circuit Judges. PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/ Harold R. DeMoss
United States Circuit Judge

REHG-2

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALPINE VIEW COMPANY LTD. and BJORN HANSEN, Plaintiffs,	§	CIVIL ACTION NO. H-95-4477
v.	§	
ATLAS COPCO AB, ATLAS COPCO COMPRESSORS, INC., ATLAS COPCO COMPTEC, INC., and ATLAS COPCO ROBBINS, Defendants.	§	

MEMORANDUM AND RECOMMENDATION

(Entered July 31, 1996)

Before the court are motions to dismiss for lack of personal jurisdiction and insufficient service of process, that were filed by Defendant Atlas Copco AB ("ACAB"). (Docket Entry #22). A similar motion to dismiss for lack of personal jurisdiction was filed by Defendant Atlas Copco Robbins ("Robbins"). (Docket Entry #6). Plaintiffs Alpine View Company and Bjorn Hanson filed a motion to remand the case to state court. (Docket Entry #16). This matter was referred by United States District Judge Vanessa D. Gilmore under 28 U.S.C. § 636(b)(1)(A) and (B). After consideration of the motions, the responses, and the applicable law, it is recommended that the motions to dismiss for lack of personal jurisdiction by Defendants

ACAB and Robbins (Docket Entries #6 and #22) should be GRANTED. If those motions are granted, Plaintiffs' motion to remand (Docket Entry #16) becomes MOOT.

I. Background

This dispute arises from an agreement that was reached in 1992 (the "1992 Agreement"), between Plaintiffs Alpine View Company Ltd. ("Alpine View"), its president, Bjorn Hansen ("Hansen"), and Uniroc AB ("Unicroc"). That 1992 Agreement purports to set out the rights to an "exclusive distributorship" for drill bits that are manufactured by Shanghai No. 1 Petroleum Machinery Works ("Shanghai No. 1"), a Chinese company. Hansen negotiated a separate agreement for the purchase of the drill bits from Shanghai No. 1, at the same time. Under the terms of the 1992 Agreement, Uniroc was authorized to distribute the drill bits worldwide and was to pay Alpine View an annual commission based on those sales.

On August 5, 1995, Plaintiffs filed suit against Defendants Atlas Copco AB ("ACAB"), Atlas Copco Compressors, Inc. ("Compressors"), Atlas Copco Comptec ("Comptec"), and Atlas Copco Robbins ("Robbins"), in the 281st Judicial District of Harris County, Texas. Plaintiffs alleged breach of contract, common law fraud, fraudulent inducement, breach of the duty of good faith and fair dealing, tortious interference with a contract, and negligent misrepresentation. (Notice of Removal, p. 1). Plaintiffs do not differentiate the allegations lodged against the named Defendants and claim that all of them, jointly, violated the 1992 Agreement by forming their

own joint venture with Shanghai No. 1 thereby undermining Plaintiffs' rights. (Plaintiffs' Original Petition, pp. 7, 12-13).

On September 13, 1995, the case was removed to this court by Defendants Comptec, Compressors, and Robbins. Comptec and Compressors have each filed motions to dismiss the action on the grounds of *forum non conveniens*. (Docket Entries #4, #9). In addition, ACAB has raised a separate challenge to the court's subject matter jurisdiction over this dispute. (Docket Entry #26). The motions are pending.

Alpine View is incorporated under the laws of the British Virgin Islands; Hansen is a resident of Sandelfjord, Norway. Defendant ACAB is a holding company, formed under the laws of Sweden, with seventy-one different subsidiary companies. Uniroc, also located in Sweden, is a division of ACAB. Compressors is a Delaware corporation, with its principal place of business in Holyoke, Massachusetts. Comptec, also a Delaware corporation, has its principal place of business in Voorheesville, New York. Robbins has its principal place of business in Kent, Washington, and is incorporated under the laws that [sic] state. Compressors, Comptec, and Robbins are wholly owned subsidiaries of Atlas Copco North America, Inc. ("ACNA"), which is, in turn, partially owned by ACAB. ACNA and Uniroc are not parties to this lawsuit.

On October 10, 1995, Plaintiff filed this motion to remand the case back to state court. (Docket Entry #16). Plaintiffs contend that the basis for removal, diversity jurisdiction under 28 U.S.C. § 1332, does not exist because alien parties are present on both sides of the lawsuit.

(Plaintiffs' Motion to Remand, pp. 1-2) [hereafter "Plaintiffs' Motion"]. As noted, Plaintiffs are citizens of the British Virgin Islands and Norway, while Defendant ACAB is a Swedish citizen. Plaintiffs argue that ACAB is a proper party to this lawsuit, that its presence defeats diversity jurisdiction, and so request the court to remand this case to the state court. (Plaintiffs' Memorandum in Support of Motion to Remand, p. 5) [hereafter "Plaintiffs' Memorandum"].

In response to the motion to remand, Compressors, Comptec, and Robbins contend that ACAB was fraudulently joined in this action solely to defeat the court's diversity jurisdiction. (Defendants' Response to Plaintiffs' Motion to Remand, pp. 2, 17-18) [hereafter "Defendants' Remand Response"]. In addition, Comptec, Compressors, and Robbins, as the removing Defendants, claim that this court cannot properly exercise personal jurisdiction over ACAB. Comptec, Compressors, and Robbins argue that the court lacks subject matter jurisdiction to resolve this suit because it arises from the alleged breach of a contract which contains a mandatory arbitration clause. Comptec, Compressors, and Robbins ask the court to consider ACAB's pending motions to dismiss for lack of personal jurisdiction, insufficient service, and lack of subject matter jurisdiction (Docket Entries #22, #26) before considering the motion to remand.

II. Discussion

Plaintiffs argue that the removal of this case was improper, but that "any question of the personal jurisdiction over [ACAB] is not germane to the determination of

whether the action was properly removed." (Plaintiffs' Motion, P. 2 n.1). However, the Fifth Circuit has held that "district courts have the power to rule on motions challenging personal jurisdiction before reaching motions to remand." *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1494 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 690 (1994) (*citing Walker v. Savell*, 355 F.2d 536, 539 (5th Cir. 1964)). The court explained that "judicial economy favors this result because if the district court remands the proceeding, then the state court will probably have to decide the same motion to dismiss for lack of personal jurisdiction that the district court avoided." *Villar*, 990 F.2d at 1494. The *Villar* court recognized that "the district court must necessarily address the issue of personal jurisdictional regardless of which motion it addresses first." *Id.* In the interest of judicial economy, the court will examine ACAB's motions to dismiss under Fed. R. Civ. P. 12(b) before ruling on Plaintiffs' motion to remand.

III. Standard of Review

Personal Jurisdiction

This court is asked to decide whether it is proper to exercise personal jurisdiction over ACAB and Robbins, who claim that they do not have the requisite minimum contracts with the State of Texas. A federal court has personal jurisdiction over a nonresident defendant to the same extent that a state court in that forum has such jurisdiction. *Gundle Lining Const. Corp. v. Adams County Asphalt, Inc.*, 85 F.3d 201, 204 (5th Cir. 1996); *Wilson v. Belin*, 20 F.3d 644, 646 (5th Cir.), *cert. denied*, 115 S.Ct. 322

(1994). The extent of jurisdiction, for a federal court sitting in Texas, will depend upon the (1) Texas long-arm statute, and (2) the due process clause of the fourteenth amendment. *Id.; Villar,* 990 F.2d at 1495; *Interfirst Bank Clifton v. Fernandez,* 844 F.2d 279, 282 (5th Cir. 1988); *Product Promotions, Inc. v. Cousteau,* 495 F.2d 483, 489 (5th Cir. 1974). The Texas long-arm statute has been held to reach the constitutional limits of the due process clause. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1986); *Schlobohm v. Shapiro,* 784 S.W.2d 355, 357 (Tex. 1990). "Because the Texas long-arm statute grants Texas courts the power to exercise jurisdiction whenever constitutional, the sole question before the district court [is] whether the district court [can] constitutionally exercise jurisdiction over the foreign defendants." *Villar,* 990 F.2d at 1495-1496 (*citing Aviles v. Kunkle,* 978 F.2d 201, 204 (5th Cir. 1992); *Schlobohm,* 784 S.W.2d at 357). The necessary two-step inquiry thus "collapses" into an analysis of whether an exercise of jurisdiction over the defendant would "impinge on their individual liberty interests – not to be subjected to suits in a distant forum with which they have little connection – that are protected by the due process clause." *Belin,* 20 F.3d at 647.

Before the court can properly exercise jurisdiction over the nonresidents defendants here, two threshold requirements must be satisfied. First, it must be shown that the nonresident defendants purposely availed themselves of the benefits and protections of the forum state by establishing "minimum contacts" with it. *Gundle Lining,* 85 F.3d at 204 (*citing International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945)). The defendant's conduct and connection with the forum must be such that it

should reasonably anticipate being haled into court in the forum state. *Gundle Lining*, 85 F.3d at 204 (*citing World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980)). Second, there must be a showing that an exercise of such jurisdiction over the nonresident defendants will not offend "traditonal notions of fair play and substantial justice." *Id.*; *Belin*, 20 F.3d at 647 (*citing Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 113 (1987)) (citations omitted).

1. Minimum Contacts

"Minimum contacts" that have been established with the forum state can justify an exercise of either "specific" or "general" personal jurisdiction over a nonresident. *Belin*, 20 F.3d at 647; *Fernandez*, 844 F.2d at 283 (*citing Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)). The requirements of specific jurisdiction are satisfied if a nonresident defendant's contacts with the forum state arise from, or relate to, the cause of action that is asserted. *Belin*, 20 F.3d at 647 (citations omitted). General jurisdiction will attach if the nonresident defendant's contacts with the forum state are both "continuous and systematic", even if its contacts are not directly related to the cause of action. *Belin*, 20 F.3d at 647; *Villar*, 990 F.2d at 1496 (citations omitted). "[T]o establish general personal jurisdiction over the defendant, the plaintiff must prove that the defendant has more substantial contacts with the forum" than those that are required when specific jurisdiction is at issue. *Villar*, 990 F.2d at 1496. Plaintiffs argue that this court may properly exercise either specific or general jurisdiction

over Robbins and ACAB. (Plaintiff's Response in Opposition to Atlas Copco AB's Motion to Dismiss for Lack of Personal Jurisdiction, p. 8) [hereafter "Plaintiffs' Response to ACAB"] and (Plaintiffs' Response in Opposition to Atlas Copco Robbins' Motion to Dismiss for Lack of Personal Jurisdiction, p. 6) [hereafter "Plaintiffs' Response to Robbins"].

a. Specific Jurisdiction

One who has "purposely directed his activities at residents of the forum" may find himself subject to the specific jurisdiction of courts sitting in that state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (*citing Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 1984)). "[W]ith respect to interstate contractual obligations . . . parties who 'reach beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other state for the consequences of their activities." *Burger King*, 471 U.S. at 473 (*quoting Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 647 (1950)). To exercise specific jurisdiction properly, "the court must examine the relationship among the defendant, the forum, and the litigation to determine whether maintaining the suit offends traditional notions of fair play and substantial justice." *Gundle Lining*, 85 F.3d at 205 (*citing Shaffer v. Hejmer*, 433 U.S. 186, 204 (1977)).

The fact that a nonresident defendant is physically absent from the forum state does not, alone, determine whether the forum can exercise personal jurisdiction over him. *Burger King*, 471 U.S. at 476. On the other hand, the mere fact that a contract was executed in the forum state

is, in itself, insufficient to establish the necessary "minimum contacts." *Burger King*, 471 U.S. at 478. In *Burger King*, the Supreme Court found the defendant to have "purposefully directed" his activities into the forum state when he took the following actions: mailed communications to the plaintiff's headquarters that were located there; promised to send money into the forum state; and agreed that the forum state's law would govern any contract dispute. *Burger King*, 471 U.S. at 476. The Fifth Circuit, relying on *Burger King*, has also recognized that one who initiates business in the forum state, agrees to make payments to the forum state, and agrees to be bound by the law of the forum state has established "minimum contacts" there. *Belin*, 20 F.3d at 649.

Plaintiffs have the burden to establish the court's jurisdiction over the foreign Defendants in this action. *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1067 (5th Cir. 1992). In response to Defendants' motions, Plaintiffs allege that an exercise of specific personal jurisdiction is proper in this forum under a "stream of commerce" theory. (Plaintiffs' Response to ACAB, p. 15, and Plaintiffs' Response to Robbins, p. 8). In pursuit of this theory of personal jurisdiction, Plaintiffs test the boundaries of specific and general jurisdiction. It is well established that "[a] single act by the defendant directed at the forum state . . . can be enough to confer [specific] personal jurisdiction *if* that act gives rise to the claim being asserted." *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 419 (5th Cir. 1993) (citation omitted) (emphasis added). "In contrast, when the act or transaction being sued upon is unrelated to the defendant's contacts with the forum state, personal jurisdiction does not exist

unless the defendant has sufficient 'continuous and systematic contacts' with the forum state to support an exercise of 'general jurisdiction.' " *Id.* The "stream of commerce" theory has been held to support the exercise of specific jurisdiction over a nonresident defendant whose only contact arises when a product, delivered into the forum "with the expectation that it should be purchased by or used by consumers in the forum state," *caused harm in the forum state. World-Wide Volkswagen v. Woodson,* 444 U.S. 286, 298 (1980) (emphasis added). Here, Plaintiffs apparently argue that an exercise of specific personal jurisdiction is proper because if a commercial entity, such as Robbins or ACAB, "sells or attempts to sell a product in the Texas market then it cannot be said that it is unfair or unjust to subject it to jurisdiction with respect to any claims that might be brought against it." (Plaintiffs' Response to ACAB, p. 16, and Plaintiffs' Response to Robbins, p. 8). In so arguing, Plaintiffs attempts to expand the stream of commerce theory to cases other than those in which the harm alleged within the forum resulted from Defendants' products. It must be noted that, here, Plaintiffs' claims are for breach of contract, common law fraud, breach of the duty of good faith and fair dealing, tortious interference with a contract, and negligent misrepresentation.

Plaintiffs claim that ACAB is a "worldwide sales and service organization" and that it has direct ties to Texas because Compressors and Comptec have offices in Houston and Dallas, Texas.[1] (Exhibits 5, 6, 13, and 14,

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[1] Plaintiffs also allege that "Atlas Copco Rental," a company that is not a party to this lawsuit, has offices in Dallas and Houston, Texas. (Plaintiffs' Response to ACAB, p. 4).

Plaintiffs' Response to ACAB). Plaintiffs argue further that ACNA was a corporation in good standing in Texas until 1988. (Exhibit 15, Plaintiffs' Response to ACAB). Plaintiffs allege that ACAB and Robbins sell their products in Texas through several independent distributors and that several Houston companies purchase products from ACAB. (Exhibits 13 and 16, Plaintiffs' Response to ACAB). Plaintiffs also claim that Robbins markets and sells its products in Texas, and that it "serves in that capacity as an agent or instrumentality for the Atlas Copco Group." (Plaintiffs' Response to Robbins, p. 6).

As noted, an exercise of specific personal jurisdiction over a nonresident defendant can be warranted if as much as one contact with the forum arises out of, or relates to, the claims that are asserted. *Gundle Lining*, 85 F.3d at 205 (*citing Helicopteros*, 466 U.S. at 414 n. 8). Defendants contend that Plaintiffs have produced no evidence to show a direct or indirect connection between ACAB, or Robbins, with the forum or with the claims made here. These companies argue, therefore, that this court cannot properly exercise specific jurisdiction over ACAB and Robbins. (Atlas Copco AB's Reply to Plaintiffs' Response In Opposition to Atlas Copco AB's Motion to Dismiss for lack of Personal Jurisdiction, p. 22) [hereafter "ACAB's Reply"]. ACAB and Robbins emphasize that any "stream of commerce" analysis to determine whether minimum contacts exist in this forum is relevant only in products liability cases. In support, ACAB relies on *Bearry v. Beech Aircraft Corp.*, 818 F.2d 370 (5th Cir. 1987). In *Bearry*, Louisiana residents, who were survivors of a Mississippi plane crash, brought suit against the defendant aircraft company in a Texas court. *Id.* at 372. The

Bearry plaintiffs claimed that the Texas court could properly exercise personal jurisdiction using a "stream of commerce" theory. *Id.* at 374. The plaintiffs argued that jurisdiction was proper because the defendant sold "large quantities of products" that flowed through the forum. *Id.* In concluding that specific personal jurisdiction did not exist, the Fifth Circuit recognized that, for reasons of federalism and due process, the "stream of commerce" doctrine applies in the following, limited situation:

> When the contact stems from a product, sold or manufactured by the foreign defendant, which has caused harm in the forum state, the court has jurisdiction if it finds that the defendant delivered the product into the stream of commerce with the expectation that it would be purchased by or used by consumers in the forum state.

Bearry, 818 F.2d at 374 (*citing World-Wide Volkswagen*, 444 U.S. at 298). The court noted further that product "stream of commerce", alone, will not support a finding of general jurisdiction. *Id.* It explained as follows: "A conclusion that there is a stream of commerce ensures that the contact that caused harm in the forum occurred there through the defendant's conduct and not the plaintiff's unilateral activities; it does not ensure that defendant's relationship with the forum is continuous and systematic, such that it can be sued there for unrelated claims." *Id.* Drawing from the Fifth Circuit's statements in *Bearry*, it is clear that these Plaintiffs must show some harm arising from Defendants' contacts with the forum, and not merely the presence of Defendants' products in the forum, in order to justify an exercise of specific personal jurisdiction by this court.

In response to ACAB's and Robbins' motions to dismiss, Plaintiffs rely on the decision to *Gulf Consolidated Serv. Inc. v. Corinth Pipeworks, S.A.*, 898 F.2d 1071 (5th Cir. 1990). Plaintiffs argue that "since the manufacturer [in *Gulf Consolidated*] had a reasonable expectation the products would be used in Texas, the exercise of personal jurisdiction was not perceived to be unfair." (Plaintiffs' Response to ACAB, p. 16, and Plaintiffs' Response to Robbins, pp. 7-8). The court in *Gulf Consolidated*, actually held that an exercise of personal jurisdiction was proper in that instance, however, because even though the transaction occurred in Greece, the dispute concerned an express warranty on a specific defective product that the manufacturer knew was intended for use in Texas. *Id.* at 1074. In fact, the contacts with Texas that were recited in *Gulf Consolidated*, were much more substantial than those proffered to established personal jurisdiction here. In *Gulf Consolidated*, the defective product was specifically intended for use in Texas at the time that the contract was formed; the defect surfaced in Texas; and a Texas resident suffered economic injury as a result of that defect. *Id.* at 1074. The *Gulf Consolidated* plaintiffs were also able to demonstrate that the defendant pipeline company had $73 million in profits derived from sales in Texas over a seven-year period. *Id.* at 1075. Indeed, the transaction that the plaintiff complained of was one of those sales. *Id.* For all of those reasons, an exercise of personal jurisdiction over the product manufacturer was found to be proper. *Id. Gulf Consolidated* is plainly distinguishable from this case. Here, Plaintiffs have made no showing analogous to that in *Gulf Consolidated*. Instead, Plaintiffs merely argue that, as a result of Defendants' conduct, they have been

"denied the opportunity to serve" the Texas market, and that "Texas businesses have also been deprived of the opportunity provided by increased competition, as well as improved technology relating to the drill bits in quesiton". (Plaintiffs' Response to ACAB, p. 17, and Plaintiff's Response to Robbins, p. 8). Plaintiffs allege that this constitutes injury to the state and its economy, and so warrants the exercise of personal jurisdiction over Robbins and ACAB.

Plaintiffs also rely on the holding in *Norplant Contraceptive Products Liability Litigation*, 886 F. Supp. 586 (E.D. Tex. 1995). In that case, the plaintiffs complained of injuries that were allegedly caused by a contraceptive system that was implanted into their arms. *Norplant*, 886 F. Supp. at 588. Alpine View and Hansen cite a portion of that opinion that states that "mere foreseeability or awareness [is] a constitutionally sufficient basis of personal jurisdiction if the defendants' product makes its way into the forum state while still in the stream of commerce." *Id.* at 590. (Plaintiffs' Response to ACAB, p. 18, Plaintiffs' Response to Robbins, p. 9). However, the case holding actually expresses the following precept:

> . . . specific jurisdiction exists when 'the contact with the forum arises from the sale . . . of a product by a foreign defendant, which has caused harm in the forum state, so long as the defendant delivered the product into the "stream of commerce" with the expectation that it should be purchased by or used by consumers in the forum state.'

Norplant, 886 F. Supp. at 590 (citations omitted). Plaintiffs' reliance on *Norplant*, to support a claim of personal jurisdiction here, is misplaced.

Plaintiffs point to three other cases to bolster the proposition that a "stream of commerce" inquiry is not limited to personal injury or products liability cases. One is an unpublished opinion from a new Jersey federal district court, *Buchanan-Enzratty Assoc. Inc. v. Rival Co.*, 1994 WL 673492 (D.N.J. 1994); one is a decision from the Supreme Court of New Jersey, *Charles Gendler & Co. v. Telecom Equip. Corp.*, 508 A.2d 1127 (N.J. Sup. Ct. 1986); and the other is a district court decision from the Eastern District of Pennsylvania, *Allen Organ Co. v. Kawai Musical Instruments Mfg.*, 593 F. Supp. 107 (E.D. Pa. 1984). None of these is binding on this court and each is readily distinguishable. To date, courts in this circuit have not recognized the proposition that a "stream of commerce" analysis extends beyond cases which involve claims for personal injury or products liability.

The *Charles Gendler* case involved the sale of an allegedly defective telephone system. A foreign corporation sold the product to a New York resident, who placed it in a business that was situated in New Jersey. *Charles Gendler*, 508 A.2d at 1130. In its decision, the New Jersey Supreme Court conceded that "we perceive no basis for allowing the nature of the injury to preclude the application of the stream-of-commerce theory", but held that "the stream-of-commerce theory can subject to the jurisdiction of the courts of this state a foreign manufacturer that has caused property damage or economic loss." *Charles Gendler*, 508 A.2d at 1139. *See also, Buchanan-Enzratty*, 1994 WL 673492 (holding the same). In this

instance, Plaintiffs' complaint against ACAB and Robbins has no demonstrable connection to this forum, or to any harm that allegedly arose from the use of Defendants' products.

The *Allen Organ* case was a patent infringement action involving a specific product delivered into the stream of commerce by a Japanese corporation. *Allen Organ*, 593 F.Supp. 107, 108 (E.D. Pa. 1984). The court allowed those plaintiffs, under Pennsylvania law, to disregard the corporate shield and impute the jurisdictional contacts of an American subsidiary to the foreign parent. *Id.* at 110. In this case, which is governed by Texas law, no similar "piercing" is justified. Moreover, *Allen Organ* involved a plaintiff that was a resident of the forum. There are no like contacts with Texas involved in this dispute.

Here, Alpine View and Hansen have not demonstrated that ACAB or Robbins have purposefully directed any activity into this forum. There has been no showing that ACAB or Robbins established any connection with Texas that could reasonably raise an anticipation of being "haled into court" here to defend a lawsuit. Plaintiffs allege only the following activities as the basis for bringing suit in a Texas court:

(a) In 1983, Plaintiffs met with representatives of Shanghai No. 1 Petroleum Works at an offshore technology conference held in Houston, Texas.

(b) That significant negotiations between Hansen and Shanghai No. 1 took place in Houston.

(c) That Hansen met with distributors of ACAB products in Texas to negotiate "potential distribution alternatives" in the United States.[2]

(Exhibit C, Affidavit of Bjorn Hansen ["Hansen Affidavit"], and Defendants' Memorandum in Support of Atlas Copco AB's Motion to Dismiss for Lack of Personal Jurisdiction and for Insufficiency of Service of Process, p. 6) [hereafter "Defendants' Memorandum"]. Hansen also states that, in October of 1992, he hired lawyers in Houston, Texas "to prepare [a] renewed distribution agreement" between Alpine View and Shanghai No. 1, recognizing Alpine View as the "exclusive distributor" for the Chinese drill bits at issue. (Plaintiffs' Original Petition, p. 6). It should be noted, however, that this "renewed agreement" was executed separately from the 1992 Agreement that forms the basis of Plaintiff's claims; moreover, it was entered into with companies which are not parties to this lawsuit. There is nothing in these unilateral activities that suggests that ACAB or Robbins purposefully availed themselves of the benefits and protections of Texas laws. Plaintiffs have provided the court with no persuasive authority that supports an application of the "stream of commerce" theory to this instance.

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[2] Hansen submits that the individuals he met with were "ACAB distributors" but he does not identify them. (Hansen Affidavit). Defendants dispute that these "unidentified ACAB distributors" were affiliated with ACAB and argue that the distributors Hansen refer to were "most likely" affiliated with Robbins, Compressors, and Comptec. (Memorandum in Support of Atlas Copco AB's Motion to Dismiss for Lack of Personal Jurisdiction and for Insufficiency of Service of Process, p. 6).

Plaintiffs have failed to show significant contacts within the forum that are relevant to the pending claims. Accordingly, the court cannot properly exercise specific personal jurisdiction over ACAB or Robbins.

b. General Jurisdiction

"[W]here the defendant's forum activities are continuing and systematic, jurisdiction may be proper without a relationship between a defendant's particular act and cause of action." *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1068 (5th Cir. 1992) (*citing Helicopteros*, 466 U.S. at 414 n. 9). When general jurisdiction is alleged, the inquiry is broader and more demanding and requires that a greater number of substantial activities in the forum state be shown. *Jones*, 954 F.2d at 1068. More than an occasional business transaction is required. *Polythane Systems, Inc. v. Marina Ventures Int'l Ltd.*, 993 F.2d 1201, 1205 (5th Cir. 1993). A greater degree of contact is required with the forum because the state has no direct interest in the cause of action. *Bearry v. Beech Aircraft Co.*, 818 F.2d 370, 374 (5th Cir. 1987) (*citing Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-48 (1952)).

Plaintiffs contend that ACAB advertises world-wide and that its products are available in Texas. (Plaintiffs' Response to ACAB, p. 9). Plaintiffs argue, therefore, that ACAB has "purposely availed themselves of the privilege of conducting activities within this state" through its subsidiaries, Comptec, Compressors, Robbins, as well as through other "divisions" which are not parties to this lawsuit. Plaintiffs argue that an exercise of personal jurisdiction over ACAB is proper based on continuous and

systematic contacts within the forum by other Atlas Copco subsidiaries.

A similar issue has been presented to the courts of this circuit on other occasions. *Gundle Lining*, 85 F.3d at 208-09; *Villar*, 990 F.2d at 1493; *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1361 (5th Cir. 1990); *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 773 (5th Cir. 1988); *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 (5th Cir. 1983); *Walker v. Newgent*, 583 F.2d 163, 166-167 (5th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979); *Cousteau*, 495 F.2d at 492-493. In general, the Fifth Circuit has ruled that a subsidiary corporation's presence and business activities in a forum will not, alone, subject the parent corporation to the jurisdiction of that forum. *Hargrave*, 710 F.2d at 1159. Further, the fact that a parent-subsidiary relationship exists between two business entities will not, by itself, justify an exercise of jurisdiction over a foreign corporation defendant. *Hargrave*, 710 F.2d at 1159.

There is, however, an exception to this general rule. In *Hargrave*, the Fifth Circuit stated that "[i]t has long been recognized that in some circumstances a close relationship between a parent and its subsidiary may justify a finding that the parent 'does business' in a jurisdiction through the local activities of its subsidiaries." 710 F.2d at 1159. The converse of that exception is true as well; that is, the activities of a parent corporation may, in some circumstances, be attributed to a subsidiary for purposes of determining jurisdiction. *Walker*, 583 F.2d at 167. But, it is well settled in this circuit that to attribute to the parent the contacts by the subsidiary, a plaintiff must "pierce the corporate veil" between the parent corporation and the entity with the relevant contacts to the forum state. *See*

Villar, 990 F.2d at 1496; *Dalton*, 897 F.2d at 1363; *Southmark*, 851 F.2d at 773; *Hargrave*, 710 F.2d at 1159-1161. The "corporate veil" is the legal recognition that a corporation is an entity distinct and separate from its shareholders. *Western Horizontal Drilling, Inc. v. Jonnet Energy Corp.*, 11 F.3d 65, 67 (5th Cir. 1994). This separation ensures to the shareholders limited liability for the corporation's obligations. *United States v. Jon-T Chemicals, Inc.*, 768 F.2d 686, 690 (5th Cir. 1985), *cert. denied*, 475 U.S. 1014 (1986). It is that aspect of limited liability that provides the opportunity and incentive for enterprise to flourish. *Jon-T Chemicals, Inc.*, 768 F.2d at 690. But this limitation on a shareholder's liability is not absolute. *Villar*, 990 F.2d at 1496. "The purpose of disregarding the corporate fiction is to prevent the corporation's owners from using the corporate entity as a cloak for fraud or illegality." *Capital Parks, Inc. v. Southeastern Advertising and Sales Systems, Inc.*, 30 F.2d 627, 630 (5th Cir. 1994).

To allow a claimant to disregard the corporate identify, and "pierce the corporate veil", a court must find support under the prevailing substantive law of the forum state. *Villar*, 990 F.2d at 1496. Whether Plaintiffs have presented sufficient facts to allow the court to disregard the corporate shield is an inquiry framed by the laws of Texas. *Gundle Lining*, 85 F.3d at 208-09; *Villar*, 990 F.2d at 1496; *Cousteau*, 495 F.2d at 489; *Hargrave*, 710 F.2d at 1161-62. In relying on this theory to establish jurisdiction, a plaintiff need only to establish a *prima facie* case. *Hargrave*, 710 F.2d at 1161. A *prima facie* case has been made once a plaintiff has "state[d] sufficient facts in the complaint to support a reasonable inference that [the] defendant can be subjected to jurisdiction within the

state." *Cousteau*, 495 F.2d at 491 n. 8 (*quoting* [5] WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1068 (1969)).

"Texas law provides three broad theories under which a court may disregard the corporate fiction." *Villar*, 990 F.2d at 1496. Here, Plaintiffs rely on the "alter ego" doctrine in their attempt to pierce ACAB's corporate identify and establish this court's jurisdiction over it. The standard that is applied to invoke "alter ego jurisdiction" is less stringent than that required for alter ego liability. *Hargrave*, 710 F.2d at 1161. Under Texas law, a corporation is deemed the alter ego of its parent if the subsidiary "is organized and operated as a mere tool or business conduit of [the parent] corporation." *Western Horizontal Drilling, Inc.*, 11 F.3d at 68. To determine whether an alter ego relationship exists, an analysis of the substance, and not the form, of the relationship between the different corporations is required. *Jon-T Chemicals, Inc.*, 768 F.2d at 693. No "litmus test" exists to determine whether a subsidiary is an alter ego of its parent, and a court must "look to the totality of the circumstances." *Jon-T Chemicals, Inc.*, 768 F.2d at 694.

The Fifth Circuit, in *Hargrave*, surveyed Texas law on the appropriate standard applied when deciding whether a subsidiary is the alter ego of its parent. 710 F.2d at 1162. This "laundry list" of factors was restated recently in *Gundle Lining*, which set out the following elements that courts are to consider when addressing this issue: (1) whether the parent and the subsidiary have common stock ownership; (2) whether the parent and subsidiary have common directors or officers; (3) whether the parent and subsidiary have common "business departments"; (4)

whether the parent and the subsidiary file consolidated tax returns; (5) whether the parent finances the subsidiary; (6) whether the parent caused the incorporation of the subsidiary; (7) whether the subsidiary operates with grossly inadequate capital; (8) whether the parent pays the salaries and other expenses of the subsidiary; (9) whether the subsidiary receives any business other than that given to it by the parent; (10) whether the parent uses the subsidiary's property as its own; and (11) whether the daily operations of the two corporations are kept separate. *Gundle Lining*, 85 F.3d at 208-09. The following, additional considerations have been found important, as well: (1) whether the corporations maintain separate books and accounts; (2) whether the two entities share common managerial or operating departments; (3) whether there are contracts between the corporations that inordinately favor one to the detriment of the other; and (4) whether any employees, officers and directors of the parent company are connected to the alleged tort. *Hargrave*, 710 F.2d at 1162-63. It is important to emphasize, however, that in applying this analysis, no single factor is controlling. *Jon-T Chemicals, Inc.*, 768 F.2d at 693-94. For instance, common officers or directors, complete stock ownership by the parent, substantial control by the parent over the subsidiary, or shared office space, alone, will not justify piercing the corporate veil. *Hargrave*, 710 F.2d at 1159-60.

It is also important to emphasize that when courts are called upon to analyze these factors, equitable principles should govern. *Harrell v. DCS Equipment Leasing*, 951 F.2d 1453, 1458 (5th Cir. 1992). Texas courts are "loathe" to disregard the corporate shield unless an injustice

would take place; therefore, the evidence must clearly establish a near "total disregard by the parent of the subsidiary," as a separate entity, before Texas law will deem one corporation the alter ego of the other. *Hargrave*, 710 F.2d at 1163.

Here, Alpine View and Hansen have proffered several facts that they urge warrant a complete disregard of ACAB's corporate structure. Plaintiffs allege the following:

(1) that ACAB owns all of the stock of ACNA, Robbins, Comptec, and Compressors;

(2) that ACAB, ACNA, Robbins, Comptec, and Compressors have common officers and directors;

(3) that ACAB provides financing to its subsidiaries through an "internal bank";

(4) that banks and credit facilities for "ACAB subsidiaries" must be approved by ACAB;

(5) that ACAB does not provide accounting information on subsidiaries, but reports financial information on a company-wide basis;

(6) that ACAB refers to its subsidiaries as divisions in its annual report;

(7) that ACAB's advertising reflects one company;

(8) that ACAB represents its subsidiary/divisions as assets in shareholder statements.

(Plaintiffs' Response to ACAB, p. 13 and exhibits 1-11, 13, 14, 18). Plaintiffs contend that this is evidence of ACAB's

control that amounts to dominance over its subsidiaries and so it is appropriate to "pierce the corporate veil" in this instance. (Plaintiffs' Response to ACAB, p. 13).

ACAB counters these allegations with its own evidence to refute the claimed dominance over Comptec, Compressors, or Robbins that would justify a disregard of its corporate identify. ACAB argues that its subsidiaries' contacts within the forum may not, therefore, be imputed to it in support of an exercise of general jurisdiction here. (Defendants' Memorandum, p. 3). ACAB points to the following factors in regard to this contention:

(1) ACAB's capitalization is distinct from that of Robbins, Comptec, and Compressors;

(2) ACAB is adequately capitalized, as are Robbins, Comptec, and Compressors;

(3) ACAB's daily operations are separate from those of Robbins, Comptec, and Compressors;

(4) ACAB's management is separate from that of Robbins, Comptec, and Compressors;

(5) ACAB's financing is separate from Robbins, Comptec, and Compressors;

(6) Only one ACAB deputy director is common to Robbins and Compressors;

(7) ACAB's books and accounts are separate from those of Robbins, Comptec, and Compressors;

(8) ACAB does not have "business departments" in common with Robbins, Comptec, and Compressors;

(9) ACAB has no contracts with Robbins, Comptec, or Compressors that favor one party over the other;

(10) ACAB's employees, officers, or directors have no connection to any tort by Robbins, Comptec, Compressors or any contract by Robbins, Comptec, or Compressors related to this suit.

(Exhibit D, Affidavit of Hans Lindblad, and Defendants' Memorandum, pp. 3-4). ACAB argues that Plaintiffs have not demonstrated that it so controls its subsidiaries that they are "mere tools", and urges the court not to allow Plaintiffs to "pierce the corporate veil" in this instance. (Defendants' Memorandum, p. 7). ACAB states that unless this court permits a "piercing", it may not properly exercise personal jurisdiction, because Defendants have no "continuous or systematic" ties to Texas that are sufficient to establish the necessary minimum contacts. (Defendants' Memorandum, p. 2).

The court agrees that Plaintiffs have not met the standard, well-established in this circuit, that justifies "piercing" these corporate identities. In *Hargrave*, the Fifth Circuit examined the relationship between the parent and the relevant subsidiary and found that the following features were probative: (1) the parent owned 100% of the subsidiary's stock; (2) the corporations had one director in common; (3) the parent had complete authority over the subsidiary's policy decisions; (4) the parent chose the subsidiary's product lines; (5) the parent controlled the hiring/firing decisions in regard to the subsidiary's officers; and (6) the parent retained final

approval over the subsidiary's capital investments. *Hargrave*, 710 F.2d at 1160. Even in light of all of those factors that indicated influence and control by the parent, the court still refused to allow that plaintiff to "pierce the corporate veil." On the facts presented here, ACAB's corporate identify cannot be properly set aside.

Moreover, even if the requisite contacts were found to exist, it is doubtful that due process considerations would otherwise support an exercise of personal jurisdiction over ACAB and Robbins.

2. Fair Play and Substantial Justice

The second element required to establish a proper exercise of personal jurisdiction is proof that, in doing so, the court would not "offend traditional notions of fair play and substantial justice" in accord with the due process clause of the United States Constitution. *Belin*, 20 F.3d at 647 (citations omitted). If a defendant has been found to have purposefully directed his actions toward the forum state, then that defendant has the burden to present "a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477. Typically, courts consider the following factors in making this determination:

1. the burden on the defendant;

2. the forum state's interest in adjudicating the dispute;

3. the plaintiff's interest in maintaining convenient and effective relief;

4. the interstate judicial system's interest in obtaining the most efficient resolution of controversies;

5. the shared interest of the several states in furthering fundamental substantive social policies.

Fernandez, 844 F.2d at 284; *Burger King*, 471 U.S. at 477.

Plaintiffs contend that it is reasonable to require ACAB and Robbins to litigate in this forum because "Texas has an interest in protecting its sovereign from economic injury by non-residents." (Plaintiffs' Response, p. 19). Plaintiffs claim that "the United States" was expected to be "the largest and most profitable territory" for the Chinese drill bits that it hoped to market under the 1992 Agreement, and that "Texas was seen as the likely hub of U.S. marketing activities." (Plaintiffs' Response, p. 3, n. 1). It is clear, however, that Plaintiffs have alleged only speculative injuries to the Texas economy as a result of the purported tortious actions by Defendants. The considerations advanced by Plaintiffs do not provide "compelling reasons" that overcome the forum state's interest in the effective use of its judicial resources. *Gundle Lining*, 85 F.3d at 207 (*citing Asahi*, 480 U.S. at 113; *World-Wide Volkswagen*, 444 U.S. at 292).

Considering the evidence and the arguments as a whole, Plaintiffs have not satisfied their threshold burden to show that ACAB and Robbins have the requisite "minimum contacts" with the forum state to allow the court a proper exercise of personal jurisdiction. Even had those minimum contacts been established, ACAB's and Robbins' connection with this forum it so remote that it would be unfair and unreasonable to maintain the suit here. Hansen's presence at a convention in Houston over

twelve years ago and his meeting with unidentified ACAB distributors in connection with the contemplated 1992 Agreement, present no justification for an exercise of personal jurisdiction here. As Defendants emphasize, ACAB's and Robbins' connections with Texas are slight. Neither corporation owns or maintains any assets, real or personal property, bank accounts, officers, agents, or employees within the State of Texas. (Defendants' Memorandum, p. 7; Robbins' Motion, pp. 1-2). Defendants argue that it would impose a substantial burden on ACAB, as a Swedish corporation with no ties to Texas, to require it to defend these claims in this forum. (Defendants' Memorandum, p. 10). There are no witnesses or relevant documents located here and the very contract that forms the basis of Plaintiffs' claims was negotiated in Norway, Sweden, and China. (Defendants' Memorandum, p. 10). This litigation does not involve Texas citizens, Texas property, or Texas law. (Defendants' Memorandum, p. 10). The court agrees with ACAB that Texas has no interest in adjudicating a dispute that involves an international agreement that was executed in Norway and that is governed by Norwegian law. (Defendants' Memorandum, p. 10).

Because Plaintiffs have not shown that Defendants have the requisite minimum contacts in this forum, they have failed to make a *prima facie* case that personal jurisdiction exists in this instance; ACAB's arguments regarding insufficient service of process need not be considered. Accordingly, ACAB's and Robbins' motions to dismiss for lack of personal jurisdiction should be granted. If ACAB's motion to dismiss is granted, complete diversity will exist

as to the remaining parties and therefore, Plaintiffs' motion to remand should be denied as moot.

IV. Conclusion

Based on the foregoing, it is

RECOMMENDED that Defendant ACAB's motion to dismiss for lack of personal jurisdiction (Docket Entry #22) be GRANTED. It is further

RECOMMENDED that Defendant Robbins' motion to dismiss for lack of personal jurisdiction (Docket Entry #26) be GRANTED. It is further

RECOMMENDED that Plaintiffs' motion to remand this case (Docket Entry #16) be DENIED AS MOOT.

The Clerk of the Court shall send copies of this memorandum and recommendation to the respective parties who will then have ten (10) days from the receipt of it to file written objections thereto, pursuant to 28 U.S.C. § 636(b)(1)(C), General Order 80-5, S.D. Texas. Failure to file written objections within the time period provided shall bar an aggrieved party from attacking the factual findings or legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas 77208; copies of any such objections shall be delivered to the chambers of Judge Vanessa D. Gilmore, and to the chambers of the undersigned, Room 7007.

SIGNED at Houston, Texas, this 30th day of July, 1996.

/s/ Mary Milloy
MARY MILLOY
UNITED STATES
MAGISTRATE JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

ALPINE VIEW COMPANY LTD, ET AL,	§	
	§	
Plaintiff,	§	CIVIL ACTION NO.
	§	H-95-4477
versus	§	
ATLAS COPCO AB, ET AL.,	§	
	§	
Defendants.	§	

ORDER ADOPTING MAGISTRATE JUDGE'S MEMORANDUM AND RECOMMENDATION

(Entered Oct. 1, 1996)

The Court has reviewed the Memorandum and Recommendation (Instrument No. 82) signed by Magistrate Judge Mary Milloy on July 30, 1996, regarding Instrument Nos. 6 and 22, motions to dismiss for lack of personal jurisdiction. Plaintiffs timely filed objections. The Court has reviewed the Memorandum and Recommendation and objections and made a de novo review of the Magistrate Judge's recommended dispositions to which objections were raised, Rule 72(b), Fed. R. Civ. P.; 28 U.S.C. § 636(b)(1)(C); *McLeod, Alexander, Powel & Apffel P.C. v. Quarles*, 925 F.2d 853, 855 (5th Cir. 1991), and after consideration of the applicable law, is of the opinion that said Memorandum and Recommendations should be adopted by this Court. It is therefore

ORDERED, ADJUDGED and DECREED that United States Magistrate Judge Milloy's Memorandum and Recommendation is hereby adopted by this Court and the motions to dismiss are hereby **GRANTED.**

The Court notes that the Memorandum and Recommendation mistakenly refers to Defendant Robbins' Motion to Dismiss as Instrument No. 26 instead of Instrument No. 6. The Court intends by this Order to **GRANT** Defendant Atlas Copco AB's Motion to Dismiss (Instrument No. 22) and Defendant Robbins' Motion to Dismiss (Instrument No. 6). Defendant Robbins' Motion to Dismiss based on subject matter jurisdiction (Instrument No. 26) is **DENIED** as moot. Plaintiff's Motion to Remand (Instrument No. 16) is also **DENIED** as moot.

The Clerk shall enter this Order and provide all parties with a true copy.

SIGNED on the 30th day of September, 1996.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES
DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALPINE VIEW COMPANY LTD. and BJORN HANSEN, Plaintiffs,	§	
v.	§	CIVIL ACTION
ATLAS COPCO AB, ATLAS COPCO COMPRESSORS, INC., ATLAS COPCO COMPTEC, INC., and ATLAS COPCO ROBBINS, Defendants.	§	NO. H-95-4477

MEMORANDUM AND RECOMMENDATION

(Filed Aug. 1, 1996)

Before the court are separate motions to dismiss for *forum non conveniens* that were filed by Defendants Atlas Copco Compressors, Inc. and Atlas Copco Comptec, Inc. (Docket Entries #4 and #9). Plaintiffs have filed a response to these motions, although it is characterized as "preliminary". (Docket Entry #14). This matter was referred by United States District Judge Vanessa D. Gilmore under 28 U.S.C. § 636(b)(1)(A) and (B). After consideration of the motions, the response, and the applicable law, it is recommended that Defendants' motions be GRANTED.

I. Background

This dispute arises from an agreement that was reached in 1992 (the "1992 Agreement"), between Plaintiffs Alpine View Company Ltd. ("Alpine View"), its president, Bjorn Hansen ("Hansen"), and Uniroc AB ("Uniroc"). That 1992 Agreement purports to set out the rights to an "exclusive distributorship" for drill bits that are manufactured by Shanghai No. 1 Petroleum Machinery Works ("Shanghai No. 1"), a Chinese company. Hansen negotiated a separate agreement for the purchase of the drill bits from Shanghai No. 1, at the same time. Under the terms of the 1992 Agreement, Uniroc was authorized to distribute the drill bits world-wide and was to pay Alpine View an annual commission based on those sales.

On August 5, 1995, Plaintiffs filed suit against Defendants Atlas Copco AB ("ACAB"). Atlas Copco Compressors, Inc. ("Compressors"), Atlas Copco Comptec ("Comptec"), and Atlas Copco Robbins ("Robbins"), in the 281st Judicial District of Harris County, Texas. Plaintiffs alleged breach of contract, common law fraud, fraudulent inducement, breach of the duty of good faith and fair dealing, tortious interference with a contract, and negligent misrepresentation. (Notice of Removal, p. 1). Plaintiffs do not differentiate the allegations lodged against the named Defendants and claim that all of them, jointly, violated the 1992 Agreement by forming their own joint venture with Shanghai No. 1 thereby undermining Plaintiffs' rights. (Plaintiffs' Original Petition, pp. 7, 12-13). On September 13, 1995, the case was removed to this court by Defendants Comptec, Compressors, and Robbins.

Alpine View is incorporated under the laws of the British Virgin Islands; Hansen is a resident of Sandelfjord, Norway. Defendant ACAB is a holding company, formed under the laws of Sweden, with seventy-one different subsidiary companies. Uniroc, also located in Sweden, is a division of ACAB. Compressors is a Delaware corporation with its principal place of business in Holyoke, Massachusetts. Comptec, also a Delaware corporation, has its principal place of business in Voorheesville, New York. Robbins has its principal place of business in Kent, Washington, and is incorporated under the laws of that state. Compressors, Comptec, and Robbins are wholly owned subsidiaries of Atlas Copco North America, Inc. ("ACNA"), which is, in turn, partially owned by ACAB. ACNA and Uniroc are not parties to this lawsuit. On July 30, 1996, a recommendation was entered that ACAB and Robbins be dismissed from this action for lack of personal jurisdiction. (Memorandum and Recommendation, entered on July 30, 1996).

On September 20, 1995, Defendants Comptec and Compressors filed identical motions to dismiss on the grounds of *forum non conveniens*. (Docket Entries #4, #9) [hereafter "Defendants' Motion"]. Comptec and Compressors argue that Plaintiffs' claims have no connection to Texas, and that Norway or Sweden, would serve as a more "proper and adequate forum to determine this dispute." (Memorandum in Support of Motion to Dismiss Based on *Forum Non Conveniens*, p. 4) [hereafter "Defendants' Memorandum"]. Comptec and Compressors contend that Norwegian law governs the 1992 Agreement because it contains an arbitration clause and choice of law provision. That agreement provides as follows:

> All disputes and claims between the parties in connection with this agreement will be settled by good faith negotiations. If the parties are unable to resolve any dispute or claim in this matter, such dispute or claim shall be resolved by arbitration. The arbitration shall take place in Oslo, Norway under Norwegian law about arbitrators.

(Exhibit A, Intentional Agreement, ¶ 8, Atlas Copco AB's Motion to Dismiss for Lack of Subject Matter Jurisdiction). Comptec and Compressors argue further that Norwegian law should govern each of Plaintiffs' tort claims as none of the allegedly fraudulent representations or acts occurred in Texas, but in Norway, Sweden, or China, if at all. (Defendants' Motions, p. 2). Comptec and Compressors argue that because the State of Texas has no connection to the contract, to the parties, or to the alleged injuries from which this dispute arises, the court should dismiss this action under the doctrine of *forum non conveniens*. (Defendants' Motions, p. 4).

Plaintiffs instituted arbitration proceedings against Uniroc and ACAB, on October 14, 1993, in Oslo, Norway, pursuant to the terms of the 1992 Agreement. The facts underlying Plaintiffs' claims in the arbitration are purportedly identical to those in the action pending here. (Exhibit A, Arbitration Ruling of 2 July 1996, pp. 4, 11, Atlas Copco AB's Reply to Plaintiffs' Supplemental Response in Opposition to Atlas Copco AB's Motion to Dismiss for Lack of Subject Matter Jurisdiction) [hereafter "July 2, 1996, Arbitration Ruling"]. The issues raised in Plaintiffs' arbitration proceeding are as follows:

> . . . [Uniroc and ACAB] are guilty of willfully and negligently committing a breach of contract and unlawfully interfering in the plaintiff's business affairs and other contractual rights in China.

(July 2, 1996, Arbitration Ruling, p. 4). In the Norwegian tribunal, Plaintiffs are seeking damages in the amount of $54,500,000.00 in United States Currency. (July 2, 1996, Arbitration Ruling, p. 4). From a review of the arbitration tribunal's ruling on July 2, 1996, it is evident that those proceedings have been extensive.

II. Discussion

"A court's authority to effect foreign transfers through the doctrine of *forum non conveniens* 'derives from the court's inherent power, under Article III of the Constitution, to control the administration of the litigation before it and to prevent its process from becoming an instrument of abuse, injustice, or oppression.' " *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 828 (5th Cir. 1993) (*quoting In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1155 (5th Cir. 1987), *aff'd in part, vacated in part*, 490 U.S. 1032 (1989), *vacated sub non. Pan Am World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989), *reinstated save as to damages under original nom.*, 883 F.2d 17 (5th Cir. 1989); and *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947)). Through this power, a district court "may decline to exercise its jurisdiction, even though the court has jurisdiction and venue, when it appears that the convenience of the parties and the court and the interests of justice indicate that the action should be tried in another forum." *Baumgart*, 981 F.2d at 828 (*citing Piper Aircraft v.*

Reyno, 454 U.S. 235, 250 (1981); *Koster*, 330 U.S. at 530; and *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 507 (1947)).

The decision to grant or deny a motion to dismiss based on *forum non conveniens* is left solely to the court's discretion. *Empressa Lineas Maritimas v. Schichau-Unterweser*, 955 F.2d 368, 374 (5th Cir. 1992). The exercise of this discretion is entitled to substantial deference on appeal, and will be overturned only if the court abuses its discretion. *Reyno*, 454 U.S. at 248. It is well established that a plaintiff's choice of forum should rarely be disturbed, but this presumption "applies with less force when the plaintiff is a foreign national." *Great Prize, S.A. v. Mariner Shipping Pty. Ltd.*, 967 F.2d 157, 160 (5th Cir. 1992); *Perez & Compania (Cataluna), S.A. v. M/V MEXICO*, 826 F.2d 1449 (5th Cir. 1987). Further, "when an alternative forum has jurisdiction to hear the case, and when trial in the chosen forum would 'establish . . . oppressiveness and vexation to a defendant . . . out of all proportion to plaintiff's convenience,' or when the 'chosen forum [is] inappropriate because of considerations affecting the court's own administrative and legal problems,' the court may, in the exercise of its sound discretion, dismiss the case." *Reyno*, 454 U.S. at 241 (*quoting Koster*, 330 U.S. at 524).

The Fifth Circuit has held that federal, and not state law, controls *forum non conveniens* determinations in federal court. *In re Air Crash*, 821 F.2d at 1159; *Nolan v. Boeing Co.*, 919 F.2d 1058, 1068 (n. 11 (5th Cir. 1990). To determine whether to dismiss a case for *Forum non conveniens*, "the court must first assure that there is an adequate alternative forum." *Great Prize*, 967 F.2d at 160. A foreign forum is available when it will exercise both personal and subject matter jurisdiction over the matter. *In re Air Crash*,

821 F.2d at 1165. A foreign forum is adequate when it does not deprive the plaintiff of all remedies or treat the parties unfairly, even though the laws applied and remedies available might differ from those received in an American court. *Id.* "Thereafter, it must balance the private and public interest factors." *Great Prize*, 967 F.2d at 160 (*citing Gilbert*, 330 U.S. 501 (1947)). To guide the trial court in exercising its discretion, the United States Supreme Court has provided a list of "private interest factors" that may affect the convenience to the litigants. *Reyno*, 454 at 241 (*citing Gilbert*, 330 U.S. at 508-09). The private interest factors that a court must consider include the following:

> . . . relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.

Reyno, 454 U.S. at 241 n. 6 (*quoting Gilbert*, 330 U.S. at 508). After the private interest factors are addressed, courts consider, if necessary, the following "public interest factors" which likewise may affect a prompt and convenience resolution of the controversy:

> . . . the administrative difficulties flowing from court congestion; the 'local interest in having localized controversies decided at home'; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary

> problems in conflicts of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

Id. (*quoting Gilbert*, 330 U.S. at 509). In reviewing a court's decision on whether to dismiss a case on the basis of *forum non conveniens*, the appellate court need only determine whether the court's balancing of the factors was reasonable. *Reyno*, 454 U.S. at 257; *Nolan*, 919 F.2d at 1068.

III. Discussion

A. Available and Adequate Forum

1. Available

As noted, the availability of a foreign forum is premised upon the notion that all of the parties and the causes of action can be brought within that forum's jurisdiction. *In re Air Crash*, 821 F.2d at 1165. Comptec and Compressors must establish that a Norwegian court will exercise subject matter jurisdiction over this dispute and can exercise personal jurisdiction over Defendants. "A defendant's submission to the jurisdiction of an alternative forum renders that forum available for purposes of *forum non conveniens* analysis." *Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 728 (5th Cir. 1990), *cert. denied*, 499 U.S. 925 (1991) (citations omitted). Comptec and Compressors have already agreed to submit to the jurisdiction of Norwegian courts. (Defendants' Motions, p. 3). Moreover, Plaintiffs have agreed to be bound by Norwegian law and have pursued claims in that forum which are identical to those presented here. Therefore, Norway is a forum that is available to hear this dispute. *Id.* at 728.

2. Adequate

A forum is deemed an adequate one if it is shown that the parties will not be treated unfairly or deprived of all remedies, even though those remedies may differ from the ones available in the American forum. *In re Air Crash,* 821 F.2d at 1165 (citations omitted). "Moreover, there is a presumption that the substantive law of the foreign forum is adequate." *Quintero,* 914 F.2d at 728 (citation omitted). Defendants argue that Norway is an adequate forum because even if the dispute was to be tried in Texas, Norwegian law would govern. (Defendants' Memoranda, p. 4). Defendants contend, therefore, that Plaintiffs would not be deprived of any remedies because the applicable law would be the same, regardless of where the case is transferred.

Plaintiffs have objected to Norway as a viable forum. Plaintiffs argue that the pending arbitration in Norway "may soon be dismissed in its entirety due to serious legal conflicts and underlying political considerations." (Plaintiffs' Response in Opposition to Atlas Copco AB's Motions to Dismiss for Insufficiency of Service of Process and Lack of Subject Matter Jurisdiction, p. 13) [hereafter "Plaintiffs' Opposition"]. Plaintiffs have also filed an affidavit from Carl August Fleischer ("Fleischer"), a Professor of Law at the University of Oslo. (Exhibit 14, Plaintiffs' Opposition) [hereafter "Fleisher Affidavit"]. Fleischer states the following opinion:

> There is clear objective evidence which shows that Bjorn Hansen, or companies controlled or owned by him, cannot expect fair and just treatment either in arbitration in Norway or, alternatively, in Norwegian courts that might have

> jurisdiction over claims brought by Bjorn Hansen.

(Fleischer Affidavit, ¶ 6, p. 2). Fleischer asserts that the Norwegian arbitration system is "tainted" with bias, corruption, and conflicts of interest. (Fleischer Affidavit, ¶¶ 9, 12, 20 pp. 2-4). Further, Fleischer opines that Hansen will experience similar bias and conflicts within the Norwegian court system due to his social prominence. (Fleischer Affidavit, ¶¶ 25, 26, pp. 5-6). For these reasons, Fleischer concludes that Norway is not a proper forum for this dispute. (Fleischer Affidavit, ¶ 28, p. 6).

Plaintiffs' contentions that Norway is not an adequate forum for this dispute must be weighed against the 1992 Agreement which forms the basis for their claims. That agreement, which is signed by Hansen, contains a clause expressly mandating arbitration in Oslo, Norway, and requiring the application of Norwegian law. It is significant to this issue that Plaintiffs chose Norway as a forum for "all disputes and claims" that might arise out of that agreement and have voluntarily instigated arbitration proceedings there. Plaintiffs should not be allowed to claim now that Norway is an unacceptable forum.

In response to Plaintiffs' objections, Defendants have offered an affidavit from Peter Lodrup, also a Professor of Law at the University of Oslo. (Exhibit A, Affidavit of Peter Lodrup, Atlas Copco AB's Supplemental Rely to Plaintiffs' Responses in Opposition to Atlas Copco AB's Motions to Dismiss for Lack of Personal Jurisdiction, For Insufficiency of Service of Process, and for Lack of Subject Matter Jurisdiction) [hereafter "Lodrup Affidavit"]. Lodrup states that arbitration, as opposed to trials, is

used "frequently and successfully" in Norway to settle both simple and complex disputes. (Lodrup Affidavit, ¶ 3). Lodrup reports that the system of arbitration employed in Norway is akin to the processes used in the United States and the United Kingdom. (Lodrup Affidavit, ¶ 4). More importantly, Lodrup recites that the Norwegian arbitration process is "fair and impartial" and looked upon with favor by Norway's courts. (Lodrup Affidavit, ¶ 5).

The court concludes that Comptec and Compressors have met their burden to show that Norwegian courts are available and adequate to adjudicate this dispute. Accordingly, the court must now balance the private and public interest factors affecting the parties under the guidelines provided by the United States Supreme Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

B. Private Interest Factors

1. Relative Ease of Access to Sources of Proof

Here, the international business agreement at issue was negotiated, executed, and was to be performed in Europe and Asia. It is undisputed that the documents central to this dispute are located in Norway, Sweden, and China. (Exhibit A, Affidavit of Jim M. Lekberg, Atlas Copco Compressors, Inc.'s Motion to Dismiss Based on *Forum non conveniens;* Exhibit A, Affidavit of David Renz, Atlas Copco Comptec's Motion to Dismiss Based on *Forum non conveniens*) [hereafter "Lekberg Affidavit" and "Renz Affidavit"]. It is also clear that most of the necessary witnesses will be forced to travel great distances to

present evidence, no matter which forum is selected. Further, it is apparent that there are no potential witnesses that reside in the United States, or in Texas. (Lekberg Affidavit, Renz Affidavit). Hansen, however, lives in Norway and all of the other witnesses, identified to date, reside in Europe or Asia. (Defendants' Memorandum, p. 6). Certainly, on these facts, Norway is the more convenient forum.

2. Availability of Compulsory Process for Attendance of Unwilling, and Costs of Obtaining Attendance of Willing Witnesses

The record here is silent in regard to the parties' ability to compel the presence of unwilling witnesses to attend proceedings in any forum. However, the court assumes that courts here would have an equal, if not more, difficult problem in obtaining compulsory process in this jurisdiction. (Lekberg Affidavit, ¶ 9, and Renz Affidavit, ¶ 9). Moreover, as this dispute centers on actions that are alleged to have occurred in Norway, Sweden, and China, the costs to transport the witnesses to the United States for trial obviously outweigh the cost of their appearance in Norway. Defendants have also pointed out that many of these witnesses have travelled to Norway already to testify at the arbitration proceedings being held on Plaintiffs' claims. (Defendants' Memorandum, p. 6).

3. View of Premises

As this case involves issues of breach of contract, fraud, and tortious interference with business relationships, it is unlikely that this factor bears on the court's findings. (Plaintiffs' Original Petition, pp. 9-16). The parties certainly do not argue that there is a necessity to view any disputed premises. Therefore, the court finds this factor irrelevant.

4. Practical Problems To Ensure an Easy, Expeditious, and Inexpensive Trial

Subsequent to the removal to federal court, in September of 1995, nothing about this case has been easy, expeditious, or inexpensive. The parties have vigorously contested the preliminary motions and pleadings and the merits of the case have not yet been addressed. In contrast, the arbitration tribunal has begun examining Plaintiffs' claims and has made some dispositive rulings. (July 2, 1996, Arbitration Ruling, p. 28).

It is clear that any trial held in the United States would be more cumbersome, protracted, and expensive for the parties. Because foreign law applies, and the evidence is located in a foreign forum, the case will require interpreters and translated documents for evaluation by an American trier of fact. As noted, there have already been "pre-trial reviews" undertaken in the arbitration proceedings. (July 2, 1996, Arbitration Ruling, p. 12).

After reviewing all of the private interest factors, the court finds that each points toward dismissal in favor of the Norwegian forum. A trial in this jurisdiction would

result in delay and expense for the parties, as well as the complications engendered by the court's task in grappling with unfamiliar jurisprudence. Because all of the private interest factors weigh in favor of dismissing this case for resolution in a more convenient forum, the court need not consider the public interest factors. *In re Air Crash*, 821 F.2d at 1165; *Empresa Lineas Maritimas*, 955 F.2d at 376. However, even a scant review of the public interest factors favor dismissal for the reasons discussed, briefly, below.

C. Public Interest Factors

1. Administrative Difficulties Flowing From Court Congestion

While the court recognizes that judicial resources are always expended in the resolution of disputes, the forum has an interest in conserving those resources, especially where the parties and the controversy are not remotely connected to it. In this case, it is clear that this dispute can be resolved more efficiently in the Norwegian courts.

2. Local Interests

This case does not involve Texas property, Texas citizens, or Texas law. (Defendants' Memorandum, p. 3). The record shows that the only contact that this action has with the forum is Hansen's attendance at an offshore technology conference in Houston twelve years ago, during which he met representatives from Shanghai No. 1. (Plaintiffs' Original Petition, p. 3). Plaintiffs also allege that they retained Houston counsel to draft an agreement

that is extraneous to the subject matter of this lawsuit. (Plaintiffs' Original Petition, p. 6). Other than these fleeting connections, all matters relevant to this action are of local interest to Norway, Sweden, or China, and therefore should be resolved elsewhere in lieu of adding to the burden of busy United States' courts.

3. Trial In a Forum that is Familiar with the Law That Governs

The Fifth Circuit, in *Air Crash*, makes it clear that a district court should make a choice of law determination in deciding a *forum non conveniens* issue. In a diversity case, federal courts must apply the substantive law of the forum state. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Because this is a diversity action, Texas choice of law principles will determine the substantive law which applies to Plaintiff's state law claims. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). "In Texas, where the parties have not agreed to the application of law to a particular issue, 'the law of the state with the most significant relationship to the particular substantive issue will be applied to resolve that issue.' " *Caton v. Leach Corp.*, 896 F.2d 939, 943 (5th Cir. 1990) (*citing Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984)). But, according to Texas law, courts must give effect to valid contractual choice of law clauses. *Tel-Phonic Servs. Inc. v. TBS Int'l Inc.*, 975 F.2d 1134, 1142 (5th Cir. 1992). The Fifth Circuit has also recognized that a forum selection clause is "*prima facie* valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." *International Software*

Sys., Inc. v. Amplicon, Inc., 77 F.3d 112, 114 (5th Cir. 1996) (citation omitted). No such "unreasonableness" has been shown here.

All relevant factors lead to the conclusion that Norwegian law is applicable to the pending case. Most important to this inquiry is that the 1992 Agreement clearly requires Norwegian law to apply to any disputes. (Exhibit A, Intentional Agreement, ¶ 8, Atlas Copco AB's Motion to Dismiss for Lack of Subject Matter Jurisdiction). Further, no party to this action is a resident of Texas or has any connection to the United States and Defendants contend that all of the wrongful acts alleged occurred, if at all, in Norway, Sweden, and China. (Renz Affidavit, Lekberg Affidavit). The application of foreign law to this dispute lends even further weight to a dismissal in favor of Norway as the more convenient forum. *Quintero*, 914 F.2d at 730 (citation omitted).

4. The Avoidance of Unnecessary Problems and Conflicts of Law

The court has determined that Norwegian law will apply to this dispute. Problems in its application and import are less likely to arise if this case is tried in that forum.

5. Burdening Citizens in an Unrelated Forum with Jury Duty

From the facts presented, this controversy reflects no true connection to this forum. It would be unfair, therefore, to require Texas citizens to sit as jurors in a case where the state has so slight an interest.

After reviewing all of the relevant considerations, the court determines that a trial in this forum would "establish . . . oppressiveness and vexation" to these Defendants that is "all out of proportion" to any convenience to the Plaintiffs. *Reyno*, 454 U.S. at 241 (citation omitted). Norway is clearly an available and adequate forum and both the private and the public interest factors weigh in favor of dismissing this suit for that more convenient forum. Accordingly, Comptec's and Compressor's motions to dismiss on the grounds of *forum non conveniens* should be granted.

IV. Conclusion

Norway is an available and adequate forum and both the private and public interest factors point toward dismissal. Accordingly, it is

RECOMMENDED that Defendants Comptec and compressors' motions to dismiss for *forum non conveniens* (Docket Entries #4 and #9) be GRANTED conditioned upon Comptec and compressors' acceptance of service of process and submission to the personal jurisdiction of an appropriate Norwegian court in response to an action commenced by Plaintiffs Alpine View and Hansen.

The Clerk shall send copies of this memorandum and recommendation to the respective parties who have ten (10) days from the receipt thereof to file written objections thereto pursuant 28 U.S.C. § 686(b)(1)(C), General Order 80-5, S.D. Texas. Failure to file written objections within the time period mentioned shall bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas 77208; copies of such objections shall be delivered to the Chambers of Judge Vanessa D. Gilmore, and to the Chambers of the undersigned, Room 7707.

SIGNED at Houston, Texas this 31st day of July, 1996.

/s/ Mary Milloy
MARY MILLOY
UNITED STATES
MAGISTRATE JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

ALPINE VIEW COMPANY LTD, ET AL, Plaintiff, versus ATLAS COPCO AB, ET AL., Defendants.	§ § § § § § § § §	CIVIL ACTION NO. H-95-4477

ORDER

(Filed Sept. 3, 1996)

IT IS HEREBY ORDERED that Plaintiff's Motion to Remand (Instrument No. 16) is **DENIED** as moot.

IT IS FURTHER ORDERED that pursuant to this Court's Order of August 28, 1996 (Instrument No. 93), that Plaintiff shall file any supplement to their preliminary response to the motion to dismiss based on *forum non conveniens* that they want considered within five (5) days of the date of this Order.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on the 4th day of September, 1996, at Houston, Texas.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES
DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALPINE VIEW COMPANY LTD, ET AL, Plaintiff,	§	CIVIL ACTION NO. H-95-4477
versus	§	
ATLAS COPCO AB, ET AL., Defendants.	§	

ORDER ADOPTING MAGISTRATE JUDGE'S MEMORANDUM AND RECOMMENDATION

(Entered Oct. 1, 1996)

The Court has reviewed the Memorandum and Recommendation (Instrument No. 85) signed by Magistrate Judge Mary Milloy on July 31, 1996, regarding Instrument Nos. 4 and 9, motions to dismiss for *forum non conveniens* filed by Atlas Copco Compressors, Inc. and Atlas Copco Comptec, Inc., respectively. Plaintiffs timely filed objections. The Court has reviewed the Memorandum and Recommendation and objections and made a de novo review of the Magistrate Judge's recommended dispositions to which objections were raised, Rule 72(b), Fed. R. Civ. P.; 28 U.S.C. § 636(b)(1)(c); *McLeod, Alexander, Powel & Apffel P.C. v. Quarles*, 925 F.2d 853, 855 (5th Cir. 1991), and after consideration of the applicable law, is of the opinion that said Memorandum and Recommendation should be adopted by this Court. It is therefore

ORDERED, ADJUDGED and DECREED that United States Magistrate Judge Milloy's Memorandum and Recommendation is hereby adopted by this Court and the motions to dismiss for *forum non conveniens* are ready **GRANTED.**

The Order of Dismissal is conditioned upon the stipulation of all of the Defendants as follows:

> Defendants stipulate and agree to submit to the jurisdiction of the Courts of Norway and to have the above referenced controversy determined under the laws of Norway, or alternatively, Defendants stipulate and agree to submit to the jurisdiction of the Courts of Sweden and to have the above referenced controversy decided under the laws of Sweden.

Should Defendants Atlas Copco Compressors, Inc. and Atlas Copco Comptec, Inc. fail or refuse to submit to the jurisdiction of the Swedish or Norwegian courts as indicated in this referenced stipulation, Plaintiffs may move for reinstatement of this action against these Defendants. A copy of this Order should be attached to any such motion.

THIS IS A FINAL JUDGMENT.

The Clerk shall enter this Order and provide all parties with a true copy.

SIGNED on the 30th day of September, 1996.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES
DISTRICT JUDGE

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ALPINE VIEW COMPANY LTD, ET AL, Plaintiff, versus ATLAS COPCO AB, ET AL., Defendants.	§ § § § § § § § §	CIVIL ACTION NO. H-95-4477

ORDER

(Entered Sept. 29, 1997)

IT IS HEREBY ORDERED that Plaintiffs' Motion to Amend Orders of Dismissal or, in the Alternative, Motion for New Trial (Instrument No. 100) and Plaintiffs' Supplement to Plaintiffs' Motion to Amend Orders of Dismissal or, in the Alternative, Motion for New Trial (Instrument No. 103) are **DENIED**.

The Clerk shall enter this Order and provide a copy to all parties.

SIGNED on the 28th day of September, 1997, at Houston, Texas.

/s/ Vanessa D. Gilmore
VANESSA D. GILMORE
UNITED STATES
DISTRICT JUDGE

Supreme Court, U.S.
FILED
JAN 15 1999
CLERK

No. 98-981

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

ATLAS COPCO AB, ATLAS COPCO ROBBINS, INC., ATLAS COPCO COMPRESSORS, INC. and ATLAS COPCO COMPTEC, INC.,

Petitioners,

vs.

ALPINE VIEW COMPANY, LTD. and BJORN HANSEN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Petitioners are Atlas Copco A.B., Atlas Copco Robbins, Inc., Atlas Copco Compressors, Inc., and Atlas Copco Comptec, Inc. Petitioners were the defendants in the underlying action originally filed in Texas state court and removed to the United States District Court for the Southern District of Texas, Houston Division, and were the Appellees in the Fifth Circuit Court of Appeals. Petitioners will be referred herein collectively as the "Atlas Copco Petitioners."

Respondents are Alpine View Company, Ltd., and Bjorn Hansen. Respondents were plaintiffs in the underlying litigation and were the Appellants in the Fifth Circuit. Respondent, Alpine View Company, Ltd., has no parent company and no nonwholly owned subsidiaries. Respondents will be referred to herein as "Respondents."

SUMMARY OF POSITION

This case arose from the federal district court's dismissal of Respondents' lawsuit based, in part, on a finding of a lack of personal jurisdiction over petitioner, Atlas Copco A.B. The district court's orders of dismissal were appealed. Thereafter, the Fifth Circuit correctly vacated the district court's orders of dismissal and remanded the case to the federal district court with an instruction that it determine the threshold issue of whether it had subject matter jurisdiction of the cause of action prior to any determination of personal jurisdiction, as suggested by *Marathon Oil v. Ruhrgas AG*, 145 F.3d 211 (5th Cir. 1998), *cert. granted*, 119 S. Ct. 589 (U.S. Dec. 7, 1998) (No. 98-470). The Atlas Copco Petitioners are now petitioning this Court to review that decision. However, the Atlas Copco Petitioners are presenting the identical issue to this Court as is currently being presented in *Ruhrgas AG v. Marathon Oil Co., et al.*, Cause No.98-470.

On December 7, 1998, this Court granted the petition for writ of certiorari filed by Ruhrgas. Because Petitioners have presented the identical question for review, Respondents file this memorandum in lieu of a full brief on the merits in opposition. *See* Robert L. Stern, et al., SUPREME COURT PRACTICE 375 (7th ed. 1993). By their memorandum, Respondents request that the Atlas Copco Petitioners' petition for writ of certiorari not be granted, but that it be held in abeyance pending this Court's decision in the *Ruhrgas* case.

PETITIONERS REQUEST FOR CERTIORARI *MIRRORS RUHRGAS v. MARATHON*

The Atlas Copco Petitioners filed their petition for writ of certiorari requesting this Court to review the decision issued in *Alpine View Company, Ltd. v. Atlas Copco Co.*, Case No. 97-

20879 by the United States Court of Appeals for the Fifth Circuit dated August 20, 1998. The Fifth Circuit based its August 20, 1998, *per curiam* opinion on *Marathon Oil Co. v. Ruhrgas AG*, 145 F.3d 211 (5th Cir. 1998). The Fifth Circuit stated that:

> *During the pendency of this appeal, our Court sitting en banc decided Marathon Oil Co. v. A.G. Ruhrgas No. 96-20361, 1998 WL 329842 (5th Cir. June 22, 1998) (en banc) The procedural circumstances involved in this appeal are very similar to those in Marathon Oil and our decision herein is controlled by that en banc decision.*

In *Marathon Oil Co. v. Ruhrgas AG*, the Fifth Circuit, sitting *en banc*, held that in a removed case, a federal district court never has discretion to dismiss for lack of personal jurisdiction before deciding whether it has subject-matter jurisdiction. *Marathon Oil Co. v. Ruhrgas AG*, 145 F.3d at 217-225. In Respondents' case, the Fifth Circuit reached the identical conclusion, ordering

> "*that this case be remanded to the district court for a determination as to whether the federal district court has subject matter jurisdiction of the cause of action as removed from the state court.*"

Thereafter, on September 18, 1998, Ruhrgas filed its petition for writ of certiorari presenting the following question for this Court's review:

> "*Whether a federal district court is absolutely barred in all circumstances from dismissing a removed case for lack of personal jurisdiction without first deciding its subject-matter jurisdiction?*"

On December 7, 1998, this Court granted the petition for writ of certiorari applied for by *Ruhrgas*. Thereafter, on December 16, 1998, the Atlas Copco Petitioners also presented, by way of their own petition for writ of certiorari, the **exact question presented by Ruhrgas**. In fact, the Atlas Copco Petitioners readily admit that their complaint about the Fifth Circuit's decision mirrors that raised in the petition for writ of certiorari filed by Ruhrgas. This is most clearly evidenced by the Atlas Copco Petitioners' petition which reads almost verbatim to the one filed by Ruhrgas wherein the Atlas Copco Petitioners admit that the "procedural circumstances in this case are similar, if not identical, to those in *Marathon*." Moreover, the Atlas Copco Petitioners have failed to raise any argument or issues different from those asserted by Ruhrgas.

Because Respondents believe this Court's decision in *Ruhrgas AG v. Marathon Oil Co., et al.*, will be controlling, there is no reason for this Court to grant certiorari in this case. Therefore, Respondents would respectfully request (i) that the Atlas Copco Petitioners' petition for writ of certiorari be held in abeyance pending a decision in *Ruhrgas AG v. Marathon Oil Co., et al.* Cause No. 98-470; (ii) that Respondents be given the opportunity to supplement this memorandum, if necessary, after the Court rules in *Ruhrgas AG v. Marathon Oil Co., et al.*; or (iii) in the alternative, if the *Ruhrgas* matter is resolved other than by a decision of this Court, that Respondents be allowed the opportunity to respond on the merits and fully brief the issues presented in the Atlas Copco Petitioners' petition for writ of certiorari.

Respectfully submitted,

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